Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

82-1334
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CEDAR POINT INVESTMENT CORPORATION, *et al.*,
Petitioners,
v.
CEDAR POINT APARTMENTS, LTD., a limited partnership
by John G. Ariko, its general partner,
Respondent.
and (CONSOLIDATED WITH)
B & D INVESTMENT CORPORATION, *et al.*,
Petitioners,
v.
WELLINGTON GREEN APARTMENTS, LTD., a limited
partnership and Anthony J. Nicholson, as general partner,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred and exceeded the permissible scope of appellate review by independently reviewing the evidence and thereafter making an independent determination of the ultimate fact, which was that after Respondents had first breached the contracts for the sale of the apartment complexes that Petitioners had voluntarily and unconditionally waived such breach?

2. Whether the Court of Appeals erred in finding and holding that there was not sufficient evidence to support the Petitioners' contention and the District Court's finding "that Sellers were induced and persuaded to proceed with the deal by representations from Nicholson and his attorney that closing would occur by June 14"?

3. Whether the Court of Appeals erred and exceeded the permissible scope of appellate review by stating and setting forth in its Opinion certain subsidiary facts upon which it relied, which facts either had not been addressed by the District Court and were contrary to Petitioners' evidence, or which failed to consider adverse findings by the District Court?

4. Whether the Court of Appeals erred and exceeded the permissible scope of appellate review and prejudiced the rights of Petitioners by finding, in the absence of any findings by the District Court and in the face of pending litigation by the Broker against Petitioners in State Court, that the Mortgage Broker was not guilty of misconduct and had not acted adversely or tortiously to Petitioners' interest?

5. Whether the Court of Appeals erred and exceeded the scope of appellate review by finding in the first instance, as a fact, that the Mortgage Broker was acting as the agent for Petitioners and not as the agent for Respondents when it requested and obtained from FHA extension of certain firm commitments to insure mortgage loans?

PARTIES

Petitioners are: Cedarpoint Investment Corporation; B & D Investment Corporation; Donald R. Ham; and Bill L. Bruce.

Respondents are: Cedar Point Apartments, Ltd., a limited partnership by John G. Ariko, its general partner; and Wellington Green Apartments, Ltd., a limited partnership and Anthony J. Nicholson, as general partner.

In addition there were certain additional defendants in the District Court who have not been named as parties. These are: Donn H. Lipton, Robert B. Millard, Christina Ferer Millard, Patricia Ferer, McDonnell Douglas Corporation, Gershman Investment Corporation, Community Federal Savings & Loan, and Missouri Savings Association. See, footnotes 1 & 2 *infra.*

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WELLINGTON GREEN APARTMENTS, LTD., a limited
partnership and Anthony J. Nicholson, as general partner,
Respondent.

PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals for the Eighth Circuit

Petitioners, Cedar Point Investment Corporation, B & D Investment Corporation, Donald R. Ham, and Bill L. Bruce (the original Defendants)[1] pray that a Writ of Certiorari issue to

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[1] Petitioners are original Defendants in the U. S. District Court.

Respondents, as part of the initial Complaints filed on August 17, 1979, sought actual damages and punitive damages for the alleged breach of the contracts and tortious interference with contractual relations, and also sought decrees of specific performance. Subsequent to the filing of their initial Complaints, each apartment complex was sold. Additional party Defendants who were the subsequent pur-

review the Judgment of the United States Court of Appeals for the Eighth Circuit entered on November 17, 1982.[2]

CITATIONS TO OPINIONS BELOW

The Opinion by the United States Court of Appeals for the Eighth Circuit is reported at 693 F.2d 748 and is printed in Appendix A hereto, *infra,* pp. A. 1 to A. 22. The Findings of Fact, Conclusions of Law and Judgment as previously rendered by the United States District Court for the Eastern District of Missouri are reported at 527 F.Supp. 602 and are printed in Appendix D hereto, *infra,* pp. A. 25 to A. 46.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit was rendered on November 17, 1982. A Petition for Rehearing or in the Alternative for Rehearing En Banc was timely filed on November 30, 1982. Thereafter, on December 22, 1982, said Petition for Rehearing was denied. (Appendix B, A. 23).

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chasers of the property or in the chain of transfer and their lenders were then added as parties. During trial, Respondents (Plaintiffs) essentially abandoned the issue of specific performance and then did not seek, on appeal, such relief. (Tr. 6) (Also see, A. 5). Accordingly, Petitioners believe, in accordance with Rule 19(6), that such additional Defendants (and Appellees below) no longer have an interest in the outcome of these proceedings and have not joined in the Petition.

Such parties are: Donn H. Lipton, Robert B. Millard, Christina Ferer Millard, Patricia Ferer, McDonnell Douglas Corporation, Gershman Investment Corporation, Community Federal Savings & Loan, and Missouri Savings Association.

[2] In accordance with Rule 28 of this Court, Petitioners state that there are no parent companies, subsidiaries or affiliates of the following corporations included as Petitioners to-wit: Cedar Point Investment Corporation and B & D Investment Corporation.

Petitioners thereafter filed a Motion for Stay of the Mandate which was sustained by Order dated January 10, 1983, a copy of which is printed in Appendix C hereto, *infra*, A. 24.

This Court has jurisdiction to review the Final Judgment and Opinion rendered by the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. §1254(1).

The United States District Court for the Eastern District of Missouri had jurisdiction pursuant to 28 U.S.C. §1332, Diversity of Citizenship, in that the controversy was between citizens of different states and exceeded Ten Thousand Dollars ($10,000.00).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Rule 52(a), Federal Rules of Civil Procedure, provides:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Section 432.010 R.S.Mo. 1978, provides:

> —No action shall be brought to charge any executor or administrator, upon any special promise to answer for any debt or damages out of his own estate, or to charge any person upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person upon any agreement made in consideration of marriage, or upon any contract made for the sale of lands, tenements, hereditaments, or an interest in or concerning them, or any lease thereof, for a longer time than one year, or upon any agreement that is not to be performed within one year from the making thereof, unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized, and no contract for the sale of lands made by an agent shall be binding upon the principal, unless such agent is authorized in writing to make said contract.

STATEMENT OF THE CASE

This Petition involves two suits, which were consolidated in the District Court, concerning contracts for the sale of two (2) apartment complexes known as the Wellington Green Apartments and the Cedar Point Apartments, both located in North St. Louis County, Missouri. Petitioners are the original Defendants (herein "Sellers"). Sellers were the selling corporations who had held record title to the property, Donald R. Ham and Bill L. Bruce, who were the sole shareholders, officers and directors of the two (2) corporations and who were also partners in a Missouri general partnership known as Bruce Properties Company. Respondents are two (2) Florida limited partnerships who maintained these proceedings as the purported assignees of the Purchaser, Anthony J. Nicholson.

Trial was held, without a jury, before the Honorable James H. Meredith, United States District Judge. During the one-week trial, the District Court heard testimony from eleven (11) witnesses and received into evidence numerous written Exhibits from both parties. A detailed stiuplation of uncontested facts was read. The Court also received into evidence depositions from Anthony J. Nicholson, John G. Ariko, Don Ham and Bill Bruce. The record in this case is replete with frequent and sharp disputes between the witnesses as to the facts and as to what occurred. Judgment was rendered on October 30, 1981 in favor of the Petitioners and against Respondents (Plaintiffs) in accordance with the District Court's Findings of Fact and Conclusions of Law. (A. 25-46).[3] The Court of Appeals rendered its Opinion reversing and remanding on November 17, 1982. (See A. 1-22). The issuance of the mandate from the Court of Appeals has been stayed pending the filing and ruling upon this Petition. (A. 24).

Two principal issues were litigated and decided by the District and the Court of Appeals.

The first issue, was which party (the Sellers or the Purchaser) first breached the contracts for the sale of the apartment complexes. Petitioners contended and the District Court so found that the Purchaser first breached the contracts; that this breach had not been completely waived by the Sellers; and, accordingly that the Sellers (Petitioners) were justified in declaring the Pur-

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[3] References to paragraphs in such stipulation of uncontested facts are denominated as "SOF ¶ ____". Page references to testimony in the transcript are denominated as "Tr. ____". References to various paragraphs in the Findings of Fact will be denominated as "FOF ____" and will also include the page in the Appendix on which such finding may be located. Similarly, references to the District Court's Conclusions of Law will be denominated as "COL ____" together with references to the Appendix. Portions of the Transcript and one exhibit have been included in the appendix.

chaser in default and in refusing to convey title. (See, COL ¶3, A. 44-45). The Court of Appeals reversed. It concluded that there was insufficient evidence to support the District Court's Finding as to a partial waiver and apparently relied upon various "facts" as set out in the Opinion. The Court, contrary to the District Court's Finding, found and concluded that there had been a complete voluntary and unconditional waiver of the Purchaser's breach as to the earnest money deposit provisions. (See A. 16-18).

The other principal issue was whether Respondents had the requisite standing to maintain these proceedings since they had failed to comply with the provisions of the contracts relating to assignment by the Purchaser. The District Court found that the assignments to Respondents failed to comply and that they lacked standing. (See FOF ¶40, COL ¶2, A. 42-44). The Court of Appeals also reversed on this issue. (See A. 5-16).

The two (2) apartment complexes, which had originally been designed and constructed by Bruce & Ham, were thereafter reacquired by them in the name of their corporations in 1974 upon default by a previous purchaser in payments. In late 1977, Thomas L. Barken, a real estate broker in St. Louis, contacted Petitioners concerning the possibility of refinancing the complexes by utilizing mortgage loans to be insured by the Federal Housing Administration (FHA), pursuant to §223(f) of the National Housing Act. Barken was a local affiliate of DRG Financial Corporation (DRG), a mortgage brokerage firm located in Washington, D.C. On January 12, 1978, DRG and Bruce Properties entered into an agreement whereby DRG was retained to process, on behalf of Bruce Properties, applications to FHA for conditional and firm commitments to insure loans pursuant to §223(f). DRG was further retained to deliver permanent loan funding commitments and, upon funding of the loans, would be entitled to a commission. On April 7, 1978, exclusive listing agreements for teh sale of the apartment complexes were executed by Bruce Properties with DRG and its affiliate Barken.

DRG and Barken then commenced efforts to sell the property and during such efforts provided information on the complexes to Nicholson and his associate, John Ariko. During this period, DRG also obtained FHA conditional commitments to insure in the name of Bruce Properties.

In the fall of 1978, Nicholson, through DRG, commenced preliminary negotiations with Bruce and Ham for the purchaser of both apartment complexes. Proposed contracts were presented to Petitioners. In October or November, 1978, there were direct negotiations in St. Louis between all concerned. The contract negotiations involved discussions concerning the amount, nature and type of the earnest money deposit, the creation of two (2) limited partnerships, and the fact that DRG could act as mortgagee for the purchaser. [See, SOF ¶17, FOF ¶20, and A. 36-37).

On January 11, 1979, final contracts for the sale of the apartment complexes were then executed by the selling corporations. The purchaser, Anthony J. Nicholson, executed these contracts on some date prior to January 22, 1979 (See, SOF ¶16, FOF ¶19, A. 36). Other than differences in the purchase price, the loan amounts, the cash to be paid at closing, and the size of the capital surplus notes, the contracts were essentially the same.

Paragraph 4 of each contract, as modified by handwriting and initialed by each party thereto, provided that the purchaser was to deposit with DRG, prior to January 30, 1979, earnest money deposit in the amount of Twenty Thousand Dollars ($20,000.00) [each contract] in the form of an irrevocable letter of credit in the favor of the Sellers. The purchaser breached. No irrevocable letter of credit or even checks (cash) was deposited with DRG prior to that date. After the fact, on February 12, 1979, Nicholson sent two (2) personal checks to DRG (Exhibit O), totalling Forty Thousand Dollars ($40,000.00), but with explicit written instructions not to deposit or cash until verbal authorization had been given. (SOF ¶¶ 19, 27, FOF ¶21, 22, A. 36-37). Subsequently, on March 8, 1979, the Florida National

Bank in Orlando sent to DRG a letter indicating that Nicholson had available a line of credit sufficient to provide an advance to close a real estate transaction and setting forth a method by which DRG could draw upon the same upon a default by Nicholson. Such letter was not an irrevocable letter of credit (See Tr. 97, COL ¶3, A. 44). Sellers, according to their testimony, did not receive this bank letter until May 8, 1979, when it was sent in response to their request.

On May 10, 1979, sellers sent DRG a telegram expressing dissatisfaction with the bank letter and demanded, with respect to the earnest money deposit provisions of the contracts, compliance by the purchaser with the exact terms thereof, no later than 5:00 p.m. EDT, May 16, 1979. Otherwise, the contracts would be considered "null and void" (Exhibit Q). Petitioners contradicted and denied Respondents evidence that it was DRG who suggested that such a telegram even be sent and had suggested the date of May 16th for compliance. Purchaser was informed verbally and in writing. The purchaser did not comply. Rather, on May 15, 1979, Nicholson telegramed DRG to express his opinion that the demand by the sellers was arbitrary, that Bruce had agreed to the bank letter, and that it was his intent to close on the contracts by the then scheduled expiration of the FHA firm commitments to insure.[4] Sellers were informed of purchasers failure to comply. At this point, both DRG and the sellers assumed that the contracts were dead because of the purchasers failure to remedy. (Tr. 632, A. 47). DRG was immediately instructed by Sellers to begin forthwith to remarket the apartments. By letter dated March 17, 1979, DRG confirmed such instructions and the Purchaser and his attorney were notified by copy (A. 47).

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[4] Paragraph 14(a) of the contracts stipulated that the closings on the sale of the apartments was to occur contemporaneously with the closing on the FHA insured loans. Firm commitments to insure were then issued by FHA on March 16, 1979. These firm commitments, by their terms, expired on June 14, 1979, ninety (90) days after issuance, unless an extension thereof was granted.

Nicholson, after he had been declared in default, the contracts declared "null and void", and DRG instructed to commence remarketing, then mailed to DRG personal checks by letter dated May 17, 1979 totalling Forty Thousand Dollars ($40,000.00). (SOF ¶25). His attorney, Joseph Baron, then sent a letter dated May 22, 1979 to DRG confirming that it was the intent and the ability of his client, as Purchaser, to close under the contracts as written. In said letter, he expressly stated:

> "Said closings will be accomplished prior to the scheduled expiration of HUD's commitments to insure". (Ex. X, A. 54-55).

The parties expressly stipulated that Mr. Baron was authorized to send this letter and to make the representations. (SOF ¶26). DRG then cashed and deposited the checks in its escrow account, informed the sellers thereof by letter, and included with said letter copies of the checks, the letter accompanying the checks, and the letter and respresentations from Baron. (A. 48-49).[1] DRG, in the same letter, advised the sellers that the various documents required for closing would be in the hands of Thomas Barken by their receipt of the letter and confirmed that closing was expected to occur no later than June 13, 1979.

Upon receipt of this communcation there was evidence that Ham, in telephone conversation with Clyde Frame of DRG, authorized them to "go ahead and try to close these transactions". He testified that DRG had indicated, during this verbal communication, that not much could be done toward the remarketing efforts of the property between then and June 14, 1979, the scheduled expiration of the commitments. Ham also testified that he felt he had reached an agreement and specific understanding with Clyde Frame of DRG that, in any event,

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[1] On December 5, 1979, after these proceedings were filed DRG filed an interpleader suit in the Circuit Court of St. Louis County, Missouri and paid said funds into the Court registry. (SOF ¶25).

closing had to occur no later than June 14. Ham had outlined to Frame some of the problems which could be caused to sellers if closing did not occur by that date. Ham further testified that Fram of DRG had indicated to him not to worry since they would know, by that date, whether purchaser, in fact, could close or not close (See, A. 47-49, 53).

On June 8, 1979, DRG requested FHA to extend the firm commitments to insure. An extension was granted by FHA on June 11, 1979 to July 16, 1979. (FOF ¶30, A. 39).

There was conflicting testimony on whether the sellers had requested or even authorized DRG to obtain the extensions from FHA. Bruce and Ham both testified and the District Court so found that the first knowledge they had concerning any extension of the commitments was on the morning of June 14, 1979 when they appeared at the FHA offices. (FOF ¶37, A. 41). Respondents presented evidence from DRG and Barken that Petitioners had requested and consented to their obtaining the extensions.

Closing did not occur by June 14, 1979. The District Court found that the Purchaser had not timely submitted to FHA all of the necessary documents for closing to occur by that date. (FOF ¶¶34, 35, A. 40). After leaving the FHA offices on June 14, 1979 and having learned that Purchaser was not able to close and had not timely submitted to FHA for its review various documents, Petitioners notified DRG that the contracts were terminated because of the Purchaser's default and failure to close by the scheduled expiration date of the FHA commitments as had been represented. (Ex. CC, FOF ¶37, A. 41).

The District Court, in its Findings of Fact and Conclusions of Law, found and stated:

> ". . . Ham then instructed Barken to continue to work toward a closing under the contracts for sale. Sellers also told DRG's Washington agent, Clyde Frame, to proceed to

closing under the constract. Sellers were induced and persuaded to proceed with the deal and convey the property to the purchaser, Nicholson, based upon the representations by Nicholson that closing would occur on or prior to June 14, 1979, the date the commitments to insure were scheduled to expire." (FOF ¶28, A. 39).

"The purchaser, Anthony J. Nicholson, breached the contracts by failing to deposit irrevocable letters of credit in favor of seller with DRG Financial Corporation on or prior to January 30, 1979. Although purchaser ultimately tendered checks as an earnest money deposit, those checks were personal, not certified. Although purchaser submitted a bank letter, that letter did not constitute an irrevocable letter of credit. Purchaser's personal checks and bank letters thus failed to comply with the specific language and terms of the contracts. Sellers bargained for clear guarantees of payment and were entitled to receive them. They did not. (COL ¶3, A. 44).

Although Sellers did accept purchaser's late tender of personal checks and the bank letter, that purchaser's breach. Sellers specifically conditioned any further agreement to complete the sales and to convey the property to the purchaser or a valid assignee on the fact that closing occur on or prior to June 14, 1979, the then scheduled expiration date of the FHA commitments to insure". (COL ¶3, A. 44-45).

The Court of Appeals, in its Opinion, disagreed with the Findings and Conclusions of the District Court and found that there was insufficient evidence as to the sellers being induced and persuaded. The Court proceeded to find that the sellers had voluntarily and unconditionally waived the purchasers breach. (A. 17-18).

In so doing, the Court of Appeals stated and set forth various facts which had not been the subject of any Findings by the

District Court. Some of these facts as stated by the Court of Appeals had been the subject of sharply disputed testimony and contradicting evidence and were contrary to Petitioner's evidence. In this regard, the Court stated that there was no evidence that DRG or Nicholson had been informed by the sellers of any conditions being attached to the acceptance of the delayed deposit. The Court also found that when DRG requested and was granted an extension of the FHA firm commitments to insure, it did so as the agent for the sellers, not as the agent for the purchasers. The Court went on to hold that DRG, when it obtained the extension of the commitments to insure, was not guilty of any misconduct and had not acted adversely to the seller's interest or tortiously in so doing. As support the Court also found that at the time the extension was requested, both the purchasers and the sellers had uncompleted contract duties. (A. 18-21).

With respect to the agency question, the District Court made no Finding on whose behalf DRG was acting when it obtained the extension of the commitments to insure. The District Court had previously found, in a Finding which was not disputed, that DRG had initially been retained by Petitioners as their agent with respect to processing a feasability study and subsequent FHA conditional and firm commitments to insure. (FOF ¶17, A. 36). The evidence showed that when this agreement had been executed the Sellers were interested in obtaining refinancing of existing mortgages. Such refinancing could then possibly assist in a subsequent sale. The record showed that, DRG then processed and obtained in the name of Bruce Properties, as sponsors, an FHA feasibility study and an FHA conditional commitments to insure. Petitioners contended, both in the District Court and in the Court of Appeals, that once the contracts for sale had been executed in January, 1979, a change in the relationship of the parties with respect to DRG occurred and DRG

became the purchaser's agent, both for financing the loans and for obtaining from FHA firm commitments to insure.[4] After execution of the contracts, the evidence showed that DRG submitted to FHA applications for and obtained in the the name of Anthony J. Nicholson and John G. Ariko (as partners of a limited partnership to be formed), as sponsors, firm commitments to insure. Unlike the prior conditional commitments, the sellers were neither parties to the application nor to the actual commitments.

With respect to whether DRG was guilty of misconduct or had acted tortiously in obtaining the extensions, the District Court made no finding. There was conflicting testimony, in the record, as to whether the sellers had requested or even authorized DRG to obtain the extensions. The record showed there was pending in the Circuit Court of St. Louis County, Missouri, a separate suit by DRG and by Barken against the Petitioners for commissions allegedly due under the original agency agreements and for real estate commissions for procuring Nicholson as the Purchaser. (This suit has not yet been tried.)

The District Court expressly found that Respondents had not fulfilled their obligations as Purchaser. (FOF ¶¶34, 35, A. 40). With respect to Petitioners, the District Court found that the repairs could have been completed and that no demand on "points" had been made in writing except by letter dated June 13, 1979. (FOF ¶¶33, 36).

Then with respect to whether the parties had unfulfilled contract duties at the time DRG requested the FHA extension of the commitments, the Court of Appeals, in its footnote number 15, relied on a letter to Sellers dated June 14, 1979, from another at-

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[4] Paragraph 11 of the contracts, provided that the purchaser had to obtain, as sponsor, FHA firm commitments to insure. Paragraph 24 of the contracts, provided that the Purchaser agreed to use DRG to be its mortgagee. (Also see FOF ¶20, A. 36).

torney for the Purchaser. In this letter, Dempsey contended that the closing could not occur at that time principally for three (3) reasons: (1) The sellers had failed to authorize DRG to sell the GNMA securities on the open market and, thus, established the discount point the sellers were to pay; (2) The sellers had failed to authorize the existing morgagees to release to the purchaser or to DRG the amounts necessary to pay off the present deeds of trust; and (3) The sellers had failed to complete certain interior repairs on the Wellington Green Apartments.

One of the major issues of dispute during the trial, concerned the obtaining and funding of the mortgage loans which were then to be insured by the FHA pursuant to its firm commitments. Respondents' evidence was that DRG was to be the mortgagee and that the funds for such loans were to come from the Sellers' then present lenders, the Missouri Savings Association (Wellington Green) and Community Federal Savings & Loan (Cedar Point), or from the sale of "GNMA" securities on the open market. Respondents contended that before DRG could fund any such loans, the number of "discount points" which the Sellers were willing to pay first had to be established, and that this could not be established because the Sellers had failed either to authorize the sale of such securities on the open market or had failed to obtain letters from the present lenders agreeing to purchase such securities at certain acceptable discount rates. Respondents presented testimony that repeated requests had been made by officials of DRG that the Sellers grant such written authorization or otherwise obtain such commitments in writing from the then lenders.

Petitioner's evidence differed significantly. Under the sale contracts, the Sellers were to pay the points "as necessary". The evidence showed that Purchaser never obtained loan commitments. Sellers testified that the only demand DRG made to them to authorize in writing the sale of the securities on the open market or to obtain written commitments from the then

lenders specifying the number of discount points was in a letter dated June 13, 1979 from Latta at DRG. (See, FOF ¶33, A. 40). Bruce further testified that during pervious discussions concerning "points" that they "Sellers" had simply offered to put DRG in touch with the present lenders to see whether such lenders would be willing to purchase such securities at a lower than market discount rate. There was evidence that Barken and DRG had been put in communication with Missouri Savings and Community Federal, and had obtained from them, verbally, information as to the number of points each would require.

With respect to the Sellers' alleged failure to have completed certain interior repairs on the Wellington Green Apartments, the District Court specifically found that such repairs could have timely been completed by the Sellers had the Purchaser given the fifteen (15) day notice as specified in the contacts for sale which have should have occurred prior to May 30, 1979. (FOF ¶36 A. 40).[7] The record showed that no written notice was given by Respondents as to closing except by letter dated June 13, 1979. (FOF ¶33, A. 40). This notice set closing for June 29, 1979 at the St. Louis FHA offices. The Court of Appeals disregarded this finding simply noting that the contract closing had been effectively extended and thus no notice was required. (A. 20, Footnote 15). The Court of Appeals did not note that the request to extend the FHA commitments to insure was not made until well after notice should have been given as specified in the contracts.

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[7] Paragraph 14(b) of the contracts provided: "*Place*. Settlement or closing hereunder shall be conducted by a person or firm designated by Purchaser, such designation to be by notice in writing given Seller not less than fifteen (15) days prior to closing hereunder."

In its opinion, the Court of Appeals also stated three other principal items as "facts" which had been the subject of disputed evidence. The District Court did not, with respect to the first two, make any specific findings. Then, with respect to the latter, the District Court Finding of Fact was contrary to the conclusion of the Court of Appeals.

First, on page 4 of their Opinion, (A. 4), the Court of Appeals noted that Petitioner Ham had on June 12, 1979 demanded fifteen (15) days prior notice of the actual closing date, claiming that the contract required such notice and then stated that an attorney for the Respondent on the next day sent a letter setting June 29, 1979 as the closing date. This statement by the Court of Appeals simply reflected testimony of David Dempsey and the position he had expressed in writing. The Court did not note that Petitioner Ham had specifically contradicted Dempsey's testimony in this regard and testified that during this conversation he had merely questioned the Purchaser's intention as to closing since the notice had not been given fifteen (15) days earlier. Ham specifically testified that he did not then demand fifteen (15) days' notice. Also admitted into evidence was a letter from Ham to Dempsey refuting Dempsey's statements as to the conversation. (See, Ex. DD, A. 51-52).

On the same page, the Court then noted that DRG, after it had been discharged had requested Petitioners "to suggest some way that the two apartment deals could be closed; in response the Sellers began immediate but unsuccessful renegotiations with the Purchasers for the sale of the same properties at a higher price". (A. 4). The record evidence differed from this statement as to what occurred. The evidence was that Mr. Latta from DRG had identified Exhibit 65 which purportedly recorded his discussion with Donald Ham concerning these negotiations. In response to a direct question from Respondents' attorney, Latta denied that it was Don Ham who said that the Purchaser should come up with an additional Three Hundred Thousand Dollars ($300,000.00). He testified that Don Ham had simply stated that

the Sellers would consider a new purchaser price at a revised FHA value. He further testified that it was Barken who thought that the revised FHA value would show an increase of Three Hundred Thousand Dollars ($300,000.00). (Tr. 431-432). Ham testified that this whole proposal had been initiated by Mr. Latta with a request as to whether "he could convey it to the Purchaser." (Tr. 674). The record further showed that under the proposal, the Purchaser would not be making a larger cash investment or down payment then already provided under the contracts. There was testimony from John Ariko that the principal item to be negotiated in an FHA financed project as here is the amount of the cash down payment since the capital surplus notes (with no personal liability) are simply a "fiction" to up the purchase price from the eighty-five percent (85%) FHA loan to the difference between the HUD appraisal as to value and the cash to be paid by the Purchaser up front. (Tr. 560-561).

Finally, the District Court, in its Findings of Fact specifically found that the extension of the FHA commitments to insure did not automatically extend the contracts or the time for closing thereunder. (FOF ¶31, A. 39). The Court of Appeals concluded otherwise stating that the FHA firm commitments to insure had been incorporated into the contracts and such commitments, by their terms, contemplated an extension thereof. (A. 19). The record evidence showed that the Purchaser, as well as the Sellers, had interpreted and construed the contracts and the commitments to insure to require that closing occur before June 16, 1979 (the scheduled expiration of the commitments),[*] unless both parties had mutually agreed to an extension of the con-

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[*] There was some apparent confusion as to the date of expiration due to a failure to consider that March and May contained 31 days.

tracts as well as an extension of the commitments to insure. This interpretation was set out in Offering Circulars prepared by Purchaser to solicit investors in the limited partnerships. Nicholson also testified in his deposition (admitted into evidence) that it had been his interpretation that there had to be a mutual agreement to extend both the contracts and the commitments until he was informed otherwise by Mr. Latta of DRG. (D. p. 132).

As noted previously, Petitioners on June 14, 1979 terminated the contracts because of the Purchaser's breach and failure to close by June 14, 1979 as had been represented. Then, on June 18, 1979 the Sellers by letter terminated their business relationship with DRG. Previously by letter dated June 13, 1979, (but which was not received by the Sellers until after June 14, 1979), an attorney for Purchaser, sent notice that closing would occur on June 29, 1979. The record showed that the Purchaser or his representative did not appear at the FHA offices at the time specified in the notice and closing did not occur. There was further evidence, that had the Purchaser or a representative for Purchaser appeared for closing at the time specified and had the Purchaser met all of the obligations under the contracts for sale, the Petitioners were prepared to close and convey title on that date. (FOF ¶¶38, 39, A. 41). The District Court concluded that even if the closings had been extended Respondents could not recover because they failed to appear. (COL ¶3, A. 45). The Court of Appeals found otherwise stating that Petitioner's repudiation relieved Respondents of further contract duties. (A. 21-22).

Paragraph 28 of the contracts, relating to assignments, provided:

> "Purchaser shall have the right to assign this agreement to any partnership of which [sic] is a general partner; provided, however, that Purchaser shall have such right of assign-

ment only if such assignee or transferee shall in writing expressly assume and agree to perform and discharge each and every obligation and liability of purchaser set forth in this agreement."

The record shows that Nicholson had only executed general assignments to Respondents. At no time had Respondents ever executed a document in writing expressly assuming and agreeing to perform and discharge the obligations and liability of the Purchaser. At trial Respondents contended, over objection, that they were empowered by the terms of the partnership agreements to assume the obligations of Purchaser. (See, FOF ¶40, A. 42). The record also shows that with respect to the Cedar Point Apartments, Anthony Nicholson was not a general but only a limited partner. The District Court held that such assignments were void as not in compliance with the contracts.

Respondents sought at trial actual damages exceeding One Million Two Hundred Thousand Dollars ($1,200,000.00) and also sought punitive damages.

Petitioners in their Petition for Rehearing raised, among other grounds, the contention that the Court had exceeded its scope of review and had found and resolved in the first instance numerous factual issues.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

Certiorari should be granted, as provided by Rule 17 since the United States Court of Appeals for the Eighth Circuit has, by its Opinion, so far departed from and exceeded the scope of permissible appellate review so as to necessitate review under this Court's power of supervision. At issue is the scope and extent to which a Federal Appellate Court, as opposed to a District Court, may resolve and determine in the first instance, independent of Rule 52, F.R.C.P., factual questions and issues.

It has been held by this Court that factual Findings by a District Court in a court tried case will not be set aside when there is substantial evidence in support unless the court is left with a definite and firm conviction that a mistake has been committed. The record and evidence must be considered in the light most favorable to Appellee. Great deference is to be accorded the trial court's ability to evaluate the credibility of witnesses. Simply because an Appellate Court would reach a different result, would give the testimony another construction, would resolve ambiguities differently, or would draw different inferences from the same testimony does not make a factual finding by the District Court "clearly erroneous" under Rule 52. See, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 89 S. Ct. 1562, 23 L.Ed.2d 129 (1969); *U.S.* v. *National Association of Real Estate Boards,* 339 U.S. 485, 70 S.Ct. 711, 94 L.Ed. 1007 (1950); *United States* v. *Gypsum Co.*, 333 U.S. 61 68 S.Ct. 525, 92 L.Ed. 746 (1948). Appellate Courts are not to make factual determinations in the first instance since they are not the finders or triers of fact. In the event that a District Court has not made findings on a particular issue, the appropriate procedure is to vacate and remand for such factual determinations. See, *DeMarco* v. *United States,* 415 U.S. 449, at 450, 94 S.Ct. 1185, 39 L.Ed.2d 501 (1974). Also see, *InWood Laboratories* v. *Ives Laboratories,* 456 U.S. 844 102 S. Ct. 2182 at 2188-90, 72 L.Ed.2d 606 (1982).

Until recently, however, various circuits of the Courts of Appeal had adopted an exception. This exception provided the "ultimate fact" was independently reviewable and subject to an independent determination by the Appellate Court free from the "clearly erroneous" strictures of Rule 52. See, *Causey* v. *Ford Motor Co.*, 516 F.2d 416 (5th Cir. 1975); *East* v. *Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975); and *Strecker* v. *Grand Forks County Social Service Board,* 640 F.2d 96 (8th Cir., En Banc, 1981).

Only recently has this court clearly and explicitly held that the "ultimate fact" exception of *Causey, supra.* incorrectly applies the law and should not be followed. Regardless of whether the factual issue is denominated as a subsidiary or ultimate, only the Federal District Courts and not the Court of Appeals have the power and jurisdiction to make such factual determinations. On review, if a District Court has not made a factual determination on a relevant issue, the appropriate procedure is to remand for determination. See *Pullman - Standard* v. *Swint,* 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (April 27, 1982). Also see, *Rogers* v. *Herman Lodge,* 456 U.S. ____, 102 S.Ct. 3272 at 3278, 73 L.Ed.2d 1012 (1982); and *InWood Laboratories* v. *Ives Laboratories, supra.*

This Court should note, that the Eighth Circuit, En Banc, in an opinion by Chief Judge Donald Lay, who also authored the opinion at issue here, approved and adopted the "ultimate fact" exception. See, *Strecker, supra.* Although a panel of the Eighth Circuit, in an opinion authored by Judge Stephenson, in *Robino* v. *Norton,*)682 F.2d 192 (8th Cir. 1982) recently recognized that the En Banc determination by Judge Lay in *Strecker* had been implicitly overruled by *Pullman,* Petitioners have not found any decision either En Banc or by a panel which included Judge Lay which has explicitly recognized that the "ultimate fact" exception of *Strecker* is neither the controlling law nor correctly sets forth the power and scope of appellate review. Also see, *O'Neal* v. *Riceland Foods,* 684 F.2d 577 (8th Cir.) by Judge Stephenson.

Petitioners respectfully submit that the Eighth Circuit panel, as shown by its opinion, is still applying its *Strecker* standard, has far exceeded the scope of permissible appellate review and has substituted its own judgment as to the facts, has resolved ambiguities differently, and has drawn different inferences from the testimony than did the District Court. Petitioners further submit that the Court improperly ignored Findings of Fact by the District Court and proceeded to determine and resolve on

its own both the ultimate and various subsidiary fact issues. Frequently these factual determinations were the subject of sharply disputed testimony and contradicting evidence. Throughout its opinion, the Court used the phrase "we find that". Such language is indicative of a Court making and resolving factual determinations. (See, among others, A. 11, 13, 13, 15, 18, 19, and 21).

Like many cases, this case turns on the resolution of the disputed facts and the Court's evaluation as to the credibility of the various witnesses. Here the testimony of Anthony Nicholson the Purchaser, significantly changed during trial from testimony previously given during his deposition, admitted into evidence. He testified during his deposition that the requisite amount of the earnest money deposit had been made and paid to DRG prior to January 30, 1979, the date specified in the contracts. He also testified during his deposition that there had been an agreement between he and the Sellers, that the Sellers would either carry back promissory notes or arrange for a bank loan to finance all but $100,000.00 of the total $567,500.00 cash to be paid at closing per the contracts. He further testified during his deposition that the Sellers had first reneged on this financing agreement during the first part of May, 1979 which then forced him to arrange for a substantially larger cash payment at closing then had been expected. During trial, when confronted with the various exhibits and having heard the testimony of his own attorney, his memory significantly improved. There had been no special agreement concerning financing of the cash purchase price. Nor had the requisite earnest money deposit been timely paid. (See Tr. 290-294, 296-302, 304-305, and 309). Nicholson further admitted on cross-examination that he felt he had a friendly relationship with the Sellers and that he was simply proceeding to try to conclude the deals without specific regard to the terms of the contracts. (Tr. 306-307). Likewise, the record is also replete with numerous and other disputes in the testimony between Petitioners and Respondents.

It was undisputed that the Purchaser first breached the contracts by failing to comply with the earnest money deposit provisions. The ultimate factual issue thus for resolution, in light of this admitted breach, was whether the Sellers had intended to voluntarily and unconditionally waive this breach by authorizing DRG to continue to work towards a closing when, after the deadline and a default declared, the Purchaser partially remedied but still not in the form required by the contracts. The District Court found only a partial waiver. The Court of Appeals reached an entirely different result, however, holding that there was insufficient evidence to support the trial courts finding that the Sellers had been "induced and pursuaded to proceed with the deal" by representations that closing would occur by the *scheduled* expirations of the commitments. In this regard, the Court of Appeals noted that there was no evidence that the Sellers had informed DRG or the Purchaser of any conditions being attached to their acceptance of the delayed deposit and that the representations by the Purchaser and his attorney were only intended to track the terminology employed in the contract paragraphs as to closing and not to offer new concessions. It also noted that there was no writing modifying the contracts.

Petitioners contend, in fact, there was substantial evidence. Certiorari should be granted to determine whether the Eighth Circuit erred in making an independent determination as to the "ultimate issue" upon its own review of the evidence.

Contrary to the statement by the Court of Appeals in its Opinion, there was *express* testimony from Donald Ham concerning a communication and verbal understanding which he had reached with DRG as to closing. (See, A. 48-49, 53). Moreover, a finding of an unconditional waiver is simply drawing different factual conclusions and inferences from the same testimony. But it is the District Court which is empowered to make and draw inferences from the evidence. The Court of Appeals cannot substitute its judgment simply because is would reach a different a result. Such has occurred here.

Missouri recognizes that a party can partially or conditionally waive a breach. See *Nicholls* v. *Kammerich,* 626 S.W.2d 653, 656-57 (Mo. App. 1981). Whether a waiver is partial or total necessarily includes a determination as to intent. Intent is a factual matter. See *Dayton Board of Education* v. *Brinkman,* 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979).

Likewise, if a writing was to be required, there had been *no* writing signed by the Sellers agreeing to modify express terms of the contracts so as to permit the earnest money deposit to be paid after the deadline and in a different form. Moreover, there was a writing signed by Purchaser's agent as to the time of closing. Such complied with the Missouri Statute of Frauds See, §432.010 R.S.Mo. 1978.

Here the Sellers by telegram dated May 10, 1979 demanded that the Purchaser's breach of the earnest money deposit provisions of the contract be remedied by 5:00 o'clock p.m., E.D.T., May 16, 1979 per the exact contract language. Otherwise, the contracts would be considered "null and void". The Purchaser did not comply. Rather, on May 15, 1979 by telegram Nicholson expressed the opinion that the demand by the Sellers was arbitrary and unreasonable and that Bruce had approved the bank letter. At this point, there is testimony that DRG and Sellers had both assumed that the deal was dead. DRG was immediately instructed by Sellers to forthwith begin remarketing the property. The Purchaser and his attorney were notified of these instructions. In this context, where the Purchaser had been declared in default, the contrats declared "null and void", and DRG instructed to commence remarketing, the Purchaser after the fact sent checks totaling $40,000 to DRG. But such, as noted by the District Court, was still not in the form required by the contracts. Purchaser's attorney, Joseph Baron, then made an express representation in writing to DRG that "said closings will be accomplished prior to the *scheduled expiration* of the HUD's commitments to insure". (Exhibit x, A. 55, Emphasis supplied).

Sellers were informed that the checks had been deposited and were sent a copy of the letter from Barton containing the representation as to when closing would occur. Ham testified he then had authorized DRG to "go ahead and try to close these transactions". But such authorization, according to his testimony, was made in the context of a verbal communication wherein DRG had indicated that not much could be done toward remarketing the property between then and June 14, 1979, the scheduled expiration of the commitments. Ham also specifically testified he felt he had reached an agreement and specific understanding with DRG that closing had to occur no later than June 14 in view of the various problems which had been outlined if closing did not occur by that date. Clyde Frame of DRG had responded by informing Ham not to worry since the Purchaser would either close or not close by that date. (A. 47-49, A. 53). At this time, the Sellers were not obligated to accept the late tender of the earnest money deposit.

The specific use of the word "scheduled" before "expiration" by Baron in his letter had a meaning and was not superfluous. Both the Sellers and the Purchaser knew that the FHA firm commitments to insure and the contracts could be extended, but only by *mutual* consent of both the Purchaser and the Sellers. This was even Purchaser's admitted interpretation. Thus, Purchaser intended to limit and preclude any extension of time. In effect, the Eighth Circuit has totally negated Baron's letter and his use of the word "scheduled" before "expiration" of any meaning. But, the letter and representations were made with a purpose - to persuade Sellers to proceed. Purchaser was in a declared default.

In addition to improperly resolving the "ultimate fact", the panel also erred in finding and resolving, in the first instance, various other subsidiary facts in support of its holding. Such is contrary to *Pullman* and *InWood Laboratories*. As outlined in the Statement of the Case, *infra*, such subsidiary facts stated by the Court of Appeals were the subject of considerable disputed

testimony. Although all of such subsidiary findings by the Court impacted in its decision to reverse, two are of particular import.

First, Petitioners submit the Court erred in Finding, as fact, that DRG in obtaining the extension of the FHA was acting as the agent for the Sellers. (A. 18-19). The District Court made no factual findings as to whether DRG at this time was acting as agent for the Sellers or for the Purchaser. Its only factual finding was to the effect that DRG had initially been retained on January 12, 1978 to act as agent for Bruce Properties with respect to processing an application for feasibility study and for a FHA mortgage insurance commitments. Petitioners do not disagree with such finding. But, such Finding by the District Court does not support a quantum leap for the Court of Appeals to then hold as a fact that DRG was *still* acting as the agent for the Sellers when it subsequently obtained in June 1979 extensions of the firm commitments to insure. Such quantum leap by the Court misconstrued the record and the change which had occurred in the parties' relationship. When the agency agreement was originally executed by Bruce Properties with DRG in January, 1978 to obtain FHA insured financing, no sale of the apartment complexes was required. Rather, the Sellers were only interested in obtaining refinancing of existing mortgages. Such refinancing could then possibly assist with a subsequent sale. In accordance with this initial agreement, DRG processed and obtained in the name of Bruce Properties, as sponsors, an FHA feasibility study and FHA *conditional* commitments to insure. These conditional commitments, in the name of Sellers, facilitated the subsequent sale contracts since the preliminary work with FHA could be transferred.

After the contracts for sale had been executed, a change occurred. DRG now became the Purchaser's agent, as opposed to the Seller's agent, for both financing the loans and for obtaining the FHA *firm* commitments to insure in the name of the Purchaser, as sponsor. The contracts contemplated and established

this new relationship.* DRG then submitted applications for and obtained from FHA *firm* commitments to insure, but in the name of the Purchaser, as sponsor. Unlike the prior conditional commitments, Sellers were not parties. Since Sellers were not parties to the firm commitments, they would have had no authority to request, much less obtain, from FHA any extension. DRG in obtaining the extensions, thus had to do so in the name of and as agent for the Purchaser, who was the sponsor, not the Sellers. Thus, contrary to the conclusion by the Eighth Circuit, the Sellers were not necessarily bound by the act of DRG in requesting and obtaining the extension of the commitments. Missouri law authorizes and recognizes that there can be a change in the agency relationship. See *Macalco, Inc.* v. *Gulf Insurance Co.*, 550 S.W.2d 883, 895 (Mo. App. 1975).

Second, Petitioners submit the Eighth Circuit has prejudiced the rights of Petitioners by finding as facts that DRG was not guilty of any misconduct and did not act adversely or tortiously with Sellers' interest in obtaining the extension of the FHA firm commitments to insure. (A. 20). The record shows that DRG and Barken presently have a suit pending in the Circuit Court of St. Louis County, Missouri against Petitioners. The District Court did not make any such factual determinations. Moreover, the issues as to misconduct and breach of fiduciary duty, loyalty and fidelity were not specifically litigated by the Sellers since such was not the primary issue and DRG was not a party. Petitioners, consequently, did not attempt to adduce all of the evidence that would otherwise be presented. Moreover there was disputed evidence as to whether DRG had obtained Petitioners' prior authorization to request the extension. Such was resolved by the District Court in favor of Petitioners. They first learned of the extension during the morning of June 14, 1979.

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* Pursuant to paragraph 24, the Purchaser employed DRG to be its mortgagee. (See, FOF ¶20, A. 37). Pursuant to paragraph 11, the Purchaser, as sponsor, had to obtain FHA *firm* commitments to insure.

(FOF ¶37, A. 41). This Court should not countenance an Appellate court absolving in the first instance a non-party from wrongdoing and misconduct particularly when a related suit by such party is still pending.

In addition to these two (2) crucial subsidiary facts, the Court also stated and relied upon certain other subsidiary facts such as a demand by Ham for fifteen (15) days' notice as to closing, and that Petitioners after terminating the contracts immediately attempted to negotiate new deals for a higher price. But, as shown, such "facts" were not in accord with Petitioners' testimony. Certainly this is not construing the record in the light most favorable to Appellees as required - especially in the absence of any findings by the District Court.

Finally, the Court of Appeals construed the contracts and found that the extension of the commitments acted as an automatic extension of the contracts. Such was contrary to an express finding by the District Court and was contrary to the Purchaser's own interpretation and intent as set out in Offering Circulars sent to prospective investors. Since the contracts were executed before the firm commitments had been obtained, the parties construction as to their intent with regards to when closing would be required is clearly relevant. Again the Court of Appeals substituted its own finding and judgment as to intent.

CONCLUSION

Petitioners submit for the foregoing reasons that the Court erred in independently finding and resolving in the first instance in violation of *Pullman* both the ultimate and numerous subsidiary factual issues and that the panel failed to accord the appropriate deference and to be bound by the factual findings of the District Court except upon a clear showing that such were "clearly erroneous". Unless corrected, Petitioners will be subject to Respondents' substantial claim for actual damages exceeding One Million Two Hundred Thousand Dollars

($1,200,000.00) together with their claim for punitive damages. If the Court of Appeals felt that the certain factual findings were necessary but were not made, the appropriate procedure would have been to vacate and remand. Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2413

Cedar Point Apartments, Ltd., a limited partnership by John G. Ariko, its general partner,

Appellant,

v.

Cedar Point Investment Corp., a Missouri corporation and William Bruce and Donald Ham; Donn H. Lipton; Robert B. Millard; McDonnell Douglas Corp.; Christina Ferer Millard; Patricia Ferer; Gershman Investment Corp.; Community Federal Savings & Loan,

Appellees.

Welling Green Apartments, Ltd., a limited partnership and Anthony J. Nicholson as general partner,

Appellant,

v.

B & D Investment Corporation; William Bruce; Donald Ham; Donn H. Lipton; Robert B. Millard; McDonnell Douglas Corp.; Christina Ferer Millard; Patricia Ferer; Missouri Savings Association,

Appellees.

Submitted: June 14, 1982

Filed: November 17, 1982

Appeal from the United States District Court
for the Eastern District of Missouri

Before LAY, Chief Judge, JOHN R. GIBSON, Circuit Judge, and FAIRCHILD,* Senior Circuit Judge.

LAY, Chief Judge.

This appeal involves a consolidation of two actions involving breach of contracts, tortious interference with contracts, and conspiracy to tortiously interfere with contracts for the sale of two apartment complexes. The district court, the Honorable James H. Meredith presiding, dismissed both cases on the grounds that the plaintiff-purchasers lacked standing to sue or, in the alternative, that plaintiffs initially breached the contracts and therefore could not recover damages for any breach by the defendant-sellers. 527 F. Supp. 602, 609-10 (E.D. Mo. 1981). We reverse; we hold that the plaintiffs have standing to sue, and that under the evidence presented they are entitled to recover for the sellers' breach of the contracts.

Facts.

Donald Ham and William Bruce, owners of the Wellington Green Apartments and the Cedar Point Apartments, employed BRG Financial Corporation in 1978 to act as their agent in all phases of application for F.H.A. Mortgage Insurance Commitments and to act as F.H.A.-approved mortgagee in processing F.H.A. insured loans on the two apartment complexes. DRG was additionally retained by Ham and Bruce as a broker and was given the exclusive right to sell both complexes. In the fall of 1978, Anthony Nicholson and John Ariko, through

* Thomas E. Fairchild, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

DRG, began preliminary negotiations with Ham and Bruce for the purchase of the properties. In January 1979 two contracts drafted by DRG were executed. Each contract required the purchasers to make a $20,000 earnest money deposit in the form of an irrevocable letter of credit in favor of the sellers no later than January 30, 1979.

On February 12, 1979, Nicholson sent two personal checks totalling $40,000 to DRG with instructions not to deposit until further authorization; Nicholson also advised DRG that he was arranging a bank letter certifying availability of funds for the checks. On March 8, 1979, the Florida National Bank sent DRG a letter stating that Nicholson had a line of credit with the bank to provide for the $40,000 advance and setting forth a method of payment in the event of insufficient funds for Nicholson's checks. On May 10, 1979, the sellers sent a mailgram to DRG which declared that the Florida bank letter did not meet the contractual requirements and instructed DRG to obtain compliance by May 16, 1979. DRG notified Nicholson that he must tender a $40,000 certified check or an irrevocable letter of credit by May 16. On May 15 Nicholson responded with a mailgram protesting the demand and claiming that the bank letter complied with the contract provisions; on May 17, however, he again mailed two personal checks totalling $40,000 to DRG.

Upon receipt of the checks DRG informed Ham of the payment; Ham instructed DRG to continue to work toward a closing under the two contracts. DRG cashed the checks and held the proceeds.

Each contract provided that a substantial portion of the purchase price was to be funded by secured notes insured by the F.H.A. The F.H.A. commitments to insure this primary funding were scheduled to expire ninety days after they were granted, or on June 14, 1979; closings on the sales of the apartments were contractually designated to occur contemporaneously with the closings on the F.H.A.-insured loans. On

June 8, 1979, with various preliminary contractual duties of both parties still incomplete, DRG requested a thirty-day extension from the F.H.A. on the commitments. The request was granted thereby extending the expiration of the commitments to July 16, 1979.

On June 8, 1979, Nicholson, who had been designated as the purchaser under the contracts, executed written assignments of all his rights in the two sales contracts to two limited partnerships. He was the general partner of one partnership, Wellington Green Apartments, Ltd.; John Ariko was the general partner of the other partnership, Cedar Point Apartments, Ltd. Ham, Bruce, Nicholson, and Ariko had previously agreed that the contracts would be assigned to two Florida limited partnerships to be formed by Nicholson and Ariko.

On June 12, 1979, Ham demanded fifteen days prior notice of the actual closing date, claiming that the contract required such notice; an attorney for the purchasers responded the next day with a letter specifying a June 29, 1979, closing date. On June 14, the sellers, who had not yet received the attorney's letter specifying a June 29 closing or DRG's notification of the thirty-day commitment extensions, appeared for closing at the F.H.A. offices. Later that same day, the sellers gave DRG written notice of immediate termination of both contracts on the ground that the purchasers had defaulted. The sellers demanded receipt of the $40,000 deposit as liquidated damages.

On June 18, 1979, the sellers discharged DRG as their agent. DRG asked Don Ham to suggest some way that the two apartment deals could be closed; in response, the sellers began immediate but unsuccessful renegotiations with the purchasers for the sale of the same properties at a higher price. Neither party appeared for the scheduled June 29 closing, and the F.H.A. commitments expired on July 16, 1979.

The two limited partnerships brought these actions on August 17, 1979, seeking specific performance of the contracts, damages equal to additional financing costs, actual damages for breach of contract, and actual and punitive damages for tortious interference with the contracts and conspiracy to interfere with the contracts. Each of the apartment complexes involved in the dispute was sold to third parties after the suits had been filed and the issue of specific performance was essentially abandoned at trial. The case was tried before the court for a week, and the district court judge ultimately dismissed both actions with prejudice. The partnerships now appeal contending that certain findings of the district court are clearly erroneous and that the trial court improperly concluded that they lack standing to sue.

Standing: The Restrictions on Assignment.

The contracts contain virtually identical provisions, including those relevant to the assignment issue. Each contract stipulates that it was entered into between the sellers and "ANTHONY J. NICHOLSON and/or ASSIGNS (hereinafter referred to as 'Purchaser')." Paragraph 21 of each contract provides: "The principals to this Agreement mutually agree that it shall be binding upon them, their and each of their respective heirs, executors, administrators, successors, and assigns." Paragraph 28 of each agreement is an assignment clause which states:

> Purchaser shall have the right to assign this Agreement to any partnership of which [sic][1] is a general partner; provided, however, that Purchaser shall have such right of assignment only if such assignee or transferee shall in writing expressly assume and agree to perform and discharge each and every obligation and liability of Purchaser set forth in this Agreement.

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[1] When the district court quoted this paragraph in its opinion, it apparently overlooked the contracts' omission of a word or words here, and inserted the word "it" where the omission appeared.

The district court held that the assignments of the contracts to the limited partnerships by Nicholson were void. The court found that the assignments were invalid on the grounds that paragraph 28 of each contract contained two express limitations on the power to make assignements which were not complied with: (1) Nicholson had not obtained a written assumption of duties from the assignee partnerships as mandated; and (2) Nicholson was merely a limited partner, not a general partner, of one of the partnerships. We respectfully must disagree. We hold that the assignments were valid. In construing paragraph 28 of the contracts, we hold as a matter of law that this paragraph serves only as a restriction on the delegation of duties, and not on the assignment of rights. Furthermore, even if it is argued that paragraph 28 was intended to affect the assignment of rights, the *power* to assign in violation of the restrictions is not affected by any stipulation in the contracts.

The provision in paragraph 28 of each contract that "Purchaser shall have the right to assign this Agreement" is an expressly permissive,[2] not prohibitive, form of assignment clause.

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[2] The clause indicates the intent of the sellers and the broker-mortgagee DRG to permit the delegation of the otherwise nondelegable duty of tendering promissory notes. Such a nondelegable duty is nevertheless delegable with or without an assignment of rights if the obligee-seller consents. *See* 4 A. Corbin, *Corbin on Contracts* § 865, at 445-46, § 870, at 475-76 (1951); J. Calamari and J. Perillo, *The Law of Contracts* §§ 18-25, -28 (2d ed. 1977); 3 S. Williston, *A Treatise on the Law of Contracts* §§ 411,411A (3d ed. 1960); Restatement (Second) of Contracts § 318(2) & comment c (1981).

The consent granted in paragraph 28 by the sellers and the mortgagee to the purchasers permitted delegation of the purchaser's duties to certain partnerships; however, in addition to delegation with the assignor remaining accountable, there must also be a promise by the assignees to perform. *See* 3 S. Williston, *supra*, § 418, at 101-03.

Paragraph 28 of the contracts is not the sole evidence of this advance consent to delegation of the purchaser's duties. The fact that "Nicholson and/or Assigns" are specifically designated as the "Pur-

Two restrictions, however, qualify this permission. As to the first restriction, each contract contains a typographical error: the purchaser's right to assign only extends "to any partnership of which [sic] is a general partner." Second, a concomitant duty is imposed if an assignment is made: the "Purchaser shall have such right of assignment only if such assignee or transferee shall in writing expressly assume and agree to perform" the purchaser's obligations under the contract.[3]

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chaser" in the contracts also discloses this permissive intent. *See* 4 A. Corbin, *supra*, § 871, at 478-79; Restatement (Second) of Contracts § 323 comment b (1981). Likewise, paragraph 21 of both contracts specifying that each agreement is binding on the principals and "each of their respective . . . assigns" is evidence of consent to the delegation of an otherwise nondelegable duty. 4 A. Corbin, *supra*, § 871, at 481; *cf. Little Rock Surgical Co.* v. *Bowers*, 227 Mo. App. 744, ____, 42 S.W.2d 367, 369 (1931); *In re Frayser's Estate*, 401 Ill. 364, ____, 82 N.E.2d 633, 638 (1948); *Baum* v. *Rock*, 106 Colo. 567, ____, 108 P.2d 230, 234 (1940) (conclusive evidence of intent). Additionally, the evidence presented during trial indisputably showed that during negotiation of the contracts, both parties anticipated that limited partnerships to be formed by Nicholson and Ariko would take over the contracts.

[3] The Restatement (Second) of Contracts § 328 (1981) provides that, unless the language or circumstances indicate the contrary, an "assignment of the contract" or of "all my rights under the contract" is not only an assignment of the assignor's rights but also a delegation of his unperformed duties under the contract; acceptance of such an assignment by an assignee is presumed to be a promise to perform the assignor's unperformed duties. *But cf. Hahn* v. *Earth City Corp.*, 625 S.W.2d 640, 643 (Mo. App. 1981) (unclear if Missouri accepts this presumption). An exception to this rule of construction exists, however, when a purchaser makes an assignment of a contract for the sale of land. Analogous to the situation where land is sold "subject to" a mortgage, no promise to assume the vendee's duties by the assignee is implied merely from the acceptance of the assignment without the presence of other circumstances indicative of such intent. *Hahn* v. *Earth City Corp.*, 625 S.W.2d 640, 643 (Mo. App. 1981); Restatement (Second) of Contracts § 328 comment c (1981); *see Senn* v. *Manchester Bank of St. Louis*, 583 S.W.2d 119, 127 (Mo. 1979) (en banc); *State ex rel. Hoyt* v. *Shain*, 338 Mo. 1208, ____, 93 S.W.2d 992, 997 (1936); *Futrall* v. *Triplett*, 84 F.2d 861, 863 (8th Cir. 1936).

Initially we must note the difficulties that have arisen when the phrase "assignment of the contract" has been employed. This ambiguous expression has been inartfully used to refer solely to an assignment of rights, solely to a delegation of duties, or to encompass both assignment of rights and delegation of duties. *See* J. Calamari and J. Perillo, *The Law of Contracts* § 18-1 (2d ed. 1977); 4 A. Corbin, *Corbin on Contracts* § 864, § 873, at 494 (1951); 3 S. Williston, *A Treatise on the Law of Contracts* § 407 (3d ed. 1961). However, unless intent to the contrary is shown, a contractual prohibition against "assignment of the contract" is presumed as a matter of law to refer only to delegation of contractual duties, not assignment of rights. *See Charles L. Bowman & Co.* v. *Erwin,* 468 F.2d 1293, 1297-98 (5th Cir. 1972); 4 A. Corbin, *supra,* § 872, at 484; 3 S. Williston, *supra,* § 422, at 138-39; Restatement (Second) of Contracts § 322(1) (1981). A contract provision expressly permitting assignment of the contract, as in paragraph 28, should likewise be so construed. Beyond the use of the phrase "right to assign this Agreement" in paragraph 28, no intent is shown that the restrictions contained in the paragraph apply to assignment of the purchaser's rights under the contracts. The clause does refer to "such assignee or transferee," but the addition of these words cannot be said to clarify the parties' intent.

These contract rights were freely assignable to the two limited partnerships. No material change in the sellers' duty to convey title to the realty or chance of receiving return performance occurred by these assignments of Nicholson's rights as purchaser under the contracts. *See* Restatement (Second) of Contracts § 317(2)(a) (1981). Such assignments were anticipated, and the

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Paragraph 28, with its provision that the assignee "shall in writing expresly assume and agree to perform" the purchaser's duties, clearly reveals the intent necessary to overcome this exception. Whether the phrase "right to assign this Agreement" in paragraph 28 was intended to refer to assignment, delegation, or both, *see* 4 A. Corbin, *supra,* § 864; 3 S. Williston, *supra,* § 407, a promise by the assignees to perform the purchaser's duties is mandated by the terms of each contract.

assignor Nicholson, whether or not a general partner of each assignee, would remain liable on the notes. *See Missouri Pacific Railroad Co.* v. *Rental Storage & Transit Co.*, 524 S.W.2d 898, 906 (Mo. App. 1975).

Alternatively, even if the phrase "right to assign this Agreement" in paragraph 28 is construed to apply to an assignment of rights, no intent is thereby shown to eliminate the *power* to assign the contracts in violation of the restrictions. The Restatement (Second) of Contracts § 322(2) (b) (1981) states the general rule that "[a] contract term prohibiting assignment of rights under the contract, unless a different intention is manifested, ... gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective . . . ." Most significantly for purposes of this appeal, neither the form nor terminology of paragraph 28 purports to clearly bar the power to assign or to invalidate an assignment not made in compliance with the restrictions. Merely the "right to assign," not the power to assign, is limited by the express language of the clause. No intent is thereby revealed to avoid an assignment not meeting the restrictions.[4] *See Detroit Greyhound Employees Federal Credit Union* v. *Aetna Life Insurance Co.*, 381 Mich. 683, ____, 167 N.W.2d 274, 277-78 (1969); 4 A. Corbin, *supra*, § 873, at 494.

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[4] One recognized commentator has pointed out that a contractual provision forbidding or restricting an assignment of rights under the contract may take any one of at least three distinct forms. J. Murray, Jr., *Murray on Contracts* § 306, at 623 (2d rev. ed. 1974); G. Grismore, *Effect of a Restriction on Assignment in a Contract*, 31 Mich. L. Rev. 299, 299-300 (1933). Only one of these forms reveals the intent necessary to preclude the power to assign or to cause an assignment violative of contractual conditions to be wholly void. Such a clause must contain express provisions to the effect that any *assignment* shall be void or that any assignment shall be invalid if not made in a certain specified way. *See Allhusen* v. *Caristo Constr. Corp.*, 303 N.Y. 446, ____, 103 N.E.2d 891, 892-93 (1952); 3 S. Williston, *supra*,

Other portions of the contract likewise do not reveal any intent to affect the validity of an assignment in violation of the contracts. To the contrary, other contractual provisions, such as the specification of the purchaser as "Nicholson and/or Assigns," and the clause binding the principals and their "assigns,"[3] as well as the circumstances surrounding the negotiation and execution of these contracts, strongly support the inference that paragraph 28, if it was intended to apply to an assignment of rights, was not intended to preclude the power to assign in violation of the restrictions.

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§ 422 n.6, at 130; J. Murray, Jr., *supra,* § 306, at 623; G. Grismore, *supra,* at 299-300; *cf. Silliman* v. *Chrisman,* 584 S.W.2d 441, 447 (Mo. App. 1979); *Portland Elec. and Plumbing Co.* v. *City of Vancouver,* 29 Wash. App. 292, ____, 627 P.2d 1350, 1351 & n.1 (1981).

If the contract provides that an assignment will make the *contract* void, the assignment is effective but the nonassigning party has the right to avoid the contract for breach of a condition precedent to his duty to perform. J. Murray, Jr., *supra,* § 306, at 623. On the other hand, the contract may contain only a promise by one or both parties to refrain from assigning or a promise to assign only under certain conditions. The promise creates a duty in the promisor but its breach does not render the assignment ineffective. *Hanigan* v. *Wheeler,* 19 Ariz. App. 49, ____, 504 P.2d 972, 975 (1972); *Murray First Thrift and Loan Co.* v. *Stevenson,* 534 P.2d 909, 911 (Utah 1975); J. Murray, Jr., *supra,* § 306, at 623; 3 S. Williston, *supra,* § 422, at 130-31 & n.6; G. Grismore, *supra,* at 300. If a breach of such a promise goes to the "root" or "essence" of the contract, the other party would have the option to avoid the contract on the basis of breach of a constructive condition. If such breach is not material, however, the other party merely would have an action for specific performance or for damages for breach of contract. G. Grismore, *supra,* at 300; *see* Restatement (Second) of Contracts §§ 225, 237, 241 (1981).

Although paragraph 28 is an affirmative grant of permission to delegate, these three conceptual distinctions are equally applicable and helpful in analyzing its effect since the permission it grants is subject to restrictions.

[3] See *supra* note 2.

We thus hold that these assignments are valid and that the assignee partnerships have standing to sue in this case as the real parties in interest. *See* Mo. Ann. Stat. § 507.010 (Vernon 1952).

Avoidance of the Contract.

Moreover, the sellers cannot successfully urge that they can avoid the contract on the ground that express conditions precedent to their duties were not fulfilled or that the assignments were a material breach of the contracts. The sellers initially dispute the assignments on the ground that there were no written promises from the assignees to comply with the stipulation that "Purchaser shall have such right of assignment only if such assignee or transferee shall in writing expressly assume and agree to perform" all the purchaser's duties under the contracts. Although there was no actual writing by the assignees,[6] we find that a valid and binding promise to assume the purchaser's duties can be implied from the conduct of the assignee partnerships. Even though an assumption of duties by the assignees is not presumed merely from acceptance of the assignment of these contracts,[7] the assignees may show intent to bind themselves by their actions, such as by suing for specific performance of the contracts as the assignee partnerships originally did here. *Epstein* v. *Gluckin*, 233 N.Y. 490, ____, 135 N.E. 861, 862 (1922) (Cardozo, J.); Restatement (Second) of Contracts § 328 comment c (1981); *see United Brick & Tile Co.* v.

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[6] It is readily apparent that the writing itself was not the operative goal under this restriction; rather, the writing was only a means to an end. *See* 3A A. Corbin, *supra*, § 650, at 114.

[7] See *supra* note 3.

McKissick, 51 F.2d 67, 69 (8th Cir.), *cert. denied*, 284 U.S. 677 (1931); *Kneberg* v. *H. L. Green Co.*, 89 F.2d 100, 103 (7th Cir. 1937).[8]

The sellers here obtained what they bargained for, although in a different form from that specified by contract. The object of the restriction requiring a written promise has been accomplished. *See Cheney* v. *Bilby*, 74 F. 52, 64-65 (8th Cir. 1896). The stipulation of a written promise is at most a condition of the purchaser's "right to assign." Such a condition may be excused without other reason if its requirement will involve extreme forfeiture or penalty, and its existence or occurrence does not form an essential part of the exchange for the promisor's performance. *Cessna Aircraft Co.* v. *Aviation, Inc.*, 243 F.2d 815, 819 (10th Cir. 1957). The absence of a written assumption of duties thus does not give these sellers the option to avoid the contracts for violation of an express condition precedent to their duty to convey.[9]

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[8] Other courts have held that assignees of a contract for the sale of land impliedly assume duties if they accept the assignment with notice of a provision within the contract that it is binding upon assigns. *See* 3 S. Williston, *supra*, § 418A n.16 (citing cases). In any event, when it is unclear whether an assumption as well as a delegation of duties has occurred, the mere presence in the original contract of a clause to the effect that assigns are bound is strong evidence of intent of assumption when there is an "assignment of the contract." 4 A. Corbin, *supra*, § 871, at 481; *cf. Kneberg* v. *H. L. Green Co.*, 89 F.2d 100, 103 (7th Cir. 1937) (the clause does not of itself impose an obligation on assignee, but gives him an option to be bound).

[9] The distinction between a mere promise or assurance that future performance will occur and a condition precedent to the duty of the other party is based upon intent. 3A A. Corbin, *supra*, § 633, at 32. The law does not favor conditions which cause forfeiture, *see Miran Inv. Co.* v. *Medical West Bldg. Corp.*, 414 S.W.2d 297, 304 (Mo. 1967); 3A A. Corbin, *supra*, § 635, and thus courts will not construe

Furthermore, construing this provision as a promise that a written assumption would be made if the contracts were assigned, we find substantial compliance existed. *See Gundaker* v. *Templer,* 560 S.W.2d 306, 309-10 (Mo. App. 1977). Nicholson did not make the written assignments to the partnerships until June 8, 1979; the partnerships did not file certificates of limited partnership with the state until June 13, 1979; the sellers declared the purchasers in default on June 14, 1979. The purchasers did not have a reasonable time before the contracts were terminated in which to deliver written promises to assume. Moreover, under the circumstances of this case, a written document evidencing an assignee's intent to assume was "merely an act to be performed in fulfillment of the ultimate contract objective, sale of the property and payment of the purchase price," and would have been a "routine element commonly attaching to the closing" of the sale of these properties. *Cohen* v. *Crumpacker,* 586 S.W.2d 370, 375 (Mo. App. 1979). Since the closings were never held, the assignee partnerships showed clear intent to assume the purchaser's duties within a reasonable time. *See* Restatement (Second) of Contracts § 204 (1981); 3A A. Corbin, *supra,* § 716. Thus substantial compliance with this restriction existed and there was no breach of a constructive condition of the contracts. *See Pasquel* v. *Owen,* 186 F.2d 263, 269-70 (8th Cir. 1950). The sellers are limited to merely seeking damages, if they can prove any, for breach of the restriction requiring a written assumption of duties.

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contract provisions to be conditions precedent to another party's duty under the contract unless "required to do so by plain, unambiguous language or by necessary implication." *Kansas City S. Ry. Co.* v. *St. Louis-San Francisco Ry. Co.,* 509 S.W.2d 457, 460 (Mo. 1974); *see* 5 S. Williston, *supra,* § 665. Words of condition, such as "upon condition that" or "provided" are not conclusive to distinguish between intent to create a condition precedent to another party's duty to perform and intent to merely covenant or promise. *Green County* v. *Quinlan,* 211 U.S. 582, 594 (1909); *Southern Surety Co.* v. *MacMillan Co.,* 58 F.2d 541, 547 (10th Cir.), *cert. denied,* 287 U.S. 617 (1932).

The sellers also contend one assignment is defective because Nicholson is a limited partner, not a general partner, of one of the assignee partnerships in violation of the restriction that "Purchaser shall have the right to assign this Agreement to any partnership of which [sic] is a general partner." We find that, under the circumstances present here, the sellers cannot use this stipulation to avoid their contractual duties on the basis of either an unfulfilled condition precedent or a breach of a constructive condition inferred from a promise.

In the Wellington Green Apartments' partnership, Nicholson is the general partner as well as one of the limited partners; John Ariko is the "initial limited partner" and one of the regular limited partners. In the Cedar Point Apartments' partnership, their roles are reversed so that Nicholson is not specified as a general partner.[10]

The trial court specifically found that Ariko as well as Nicholson had participated fully in the negotiations. 527 F. Supp. at 606. Both Nicholson and Ariko testified that before the execution of the contracts they discussed with the sellers the possibility that their roles as general partner and special limited partner might be reversed for financing purposes in one of the assignee partnerships to be formed. Both reported the sellers' response to be merely that they had done the same thing themselves on occasion. The testimony of Thomas Barken, associate of DRG and sellers' local sales agent, is also in accord on this point. Bill Bruce, one of the sellers, conceded in testimony that it probably would not make any difference to him as seller whether Ariko or Nicholson was a general partner.

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[10] Despite the different nomenclatures applied to Nicholson's status in the partnerships, Nicholson, as either general partner or "initial limited partner," shares in 4% of the general profits and losses and 33.33% of the profits from major capital events in both partnerships. Ariko, on the other hand, as either general partner or "initial limited partner," shares in only 1% of the general profits and losses and 16.67% of the profits from major capital events in both partnerships.

Additionally, in paragraph 16(b) of each contract, the seller warrants "[t]hat Seller understands that various divisions and subsidiaries of Purchaser, and officers, principals and stockholders thereof may be involved in this transaction as real estate brokers, mortgage brokers, general partners, limited partners, or agent or principal for the sale of mortgage-backed securities." Moreover, the F.H.A. commitments, applied for by DRG after the execution of the contract, list the proposed mortgagors on the projects as "Anthony J. Nicholson & John G. Ariko, General Partners, Partnership to be formed."

The evidence thus overwhelmingly supports the conclusion that John Ariko was intended by all the parties as a possible general partner of one assignee partnership. Although insertion of the word "it" into the deleted portion of paragraph 28 of both contracts would probably allow the paragraph to be read the way it was originally drafted, we find that such an interpretation clearly fails to express correctly the understanding reached by the parties as to the permissible structure of the limited partnerships. Whether we employ a process of interpretation, including the rule construing doubtful provisions against the drafting party, *Eastmount Construction Co.* v. *Transport Manufacturing & Equipment Co.*, 301 F.2d 34, 41 (8th Cir. 1962); 3 A. Corbin, *supra*, § 559, or employ the vehicle of contract reformation to correct a mistake in the written expression of the parties' agreement, *J.E. Hathman, Inc.* v. *Sigma Alpha Epsilon Club*, 491 S.W.2d 261, 268 (Mo. 1973) (en banc); *Edwards* v. *Zahner*, 395 S.W.2d 185, 189-90 (Mo. 1965); Restatement (Second) of Contracts §§ 155, 156 (1981), the sellers cannot avoid their duties under these contracts on the ground that Nicholson was not explicitly made a general partner of one assignee partnership when the evidence of the parties' true intent is so one-sided.[11]

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[11] This conclusion does not prejudice the sellers. Nicholson remains personally liable on the performance of the contract as the original purchaser and assignor. *Missouri Pac. R. R. Co.* v. *Rental Storage & Transit Co.*, 524 S.W.2d 898, 906 (Mo. App. 1975). With Ariko

The Contract Benefits.

In an alternative finding, the district court held that, even if the limited partnerships did have standing, they could not claim the benefits of the contracts because they failed to meet the June 14, 1979, closing date. 527 F. Supp. at 610. The court reasoned that the sellers only partially waived the purchasers' initial breach when they accepted the late down payment. It held that the sellers conditioned further contract performance on a closing date on or before June 14, 1979, the originally scheduled expiration date of the F.H.A. commitments.

Paragraph 14(a) of both contracts stipulates that the closings on the sale of the apartments are to occur contemporaneously with the closings on the F.H.A.-insured loans.[12] At the time

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designated as general partner of one partnership, the sellers in fact have increased their security; Ariko by such partnership formation subjects himself to personal liability beyond his ownership as a limited partner. *Compare* Mo. Ann. Stat. §§ 359.090, 358.150 (Vernon 1968) *with* Mo. Ann. Stat. § 359.070 (Vernon 1968). Additionally, because of Nicholson's control over the disputed partnership, the purchasers have a strong argument in their contention that Nicholson would be found by a court to be a general partner as a matter of law. *See Filesi* v. *United States*, 352 F.2d 339, 341 (4th Cir. 1965); Mo. Ann. Stat. § 359.070 (Vernon 1968); *see also Garbo* v. *Hilleary Franchise Systems, Inc.*, 479 S.W.2d 491, 497-98 (Mo. App. 1972).

[12] Paragraph 14(a) states:

> *Time.* Settlement (closing) hereunder shall take place contemporaneously with the closing of the insured mortgage loan contemplated by Paragraph 10 hereof, and if the closing of the sale contemplated by this Agreement shall not have occurred on or before the expiration of said commitment through a failure or refusal on the part of Purchaser to perform its obligations hereunder, then this Agreement shall be null and void and of no further force or effect and the deposit made pursuant to paragraph 4 hereof shall be paid to seller free and clear of any and all claims or rights of Purchaser.

Paragraph 27 of each contract provides: "*Closing.* The reference herein to closing means the closing held in which the first mortgage note is endorsed pursuant to the FHA conditional commitment attached hereto as Exhibit 'B'."

these contracts were executed, the parties did not have firm commitments form the F.H.A. to insure the first mortgages, and thus did not know the expiration date of such commitments. When the firm commitments were issued on March 16, 1979, they were scheduled to expire June 14, 1979, unless an extension of time was granted.[1]

After the sellers rejected Nicholson's letter of credit and demanded contract compliance by May 16, 1979, Nicholson protested the sellers' action by telegram and concluded: "It is my intent to close the contracts within the FHA commitment deadline of June 16 1979 . . . ." This telegram was sent two days before Nicholson mailed the personal checks for $40,000 to DRG on May 17. When these checks were accepted and the sellers authorized DRG to proceed to closing, neither DRG nor Nicholson were expressly informed by the sellers of any conditions attached to acceptance of the delayed deposit. On May 22, 1979, shortly after Nicholson had sent the checks which were cashed, Joseph Baron, attorney for the purchasers, sent a letter to DRG confirming the intent and ability of the purchasers to close the sale and stating: "Said closings will be accomplishd prior to the scheduled expiration of HUD's commitments to insure."

At the time of these declarations by Nicholson and Baron concerning the closing date, the scheduled expiration date on the loan commitments happened to be June 14, 1979. On June 8, 1979, however, an extension of the loan commitments was requested by DRG.

We do not find sufficient evidence to support the sellers' contention and the trial court's finding, *see* 527 F. Supp. at 607,

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[1] The F.H.A. commitments both stated: "This commitment shall expire 90 days from date of commitment, unless duly extended in writing by the Commissioner and upon such expiration all rights and obligations of the respective parties shall cease."

that sellers were "induced and persuaded to proceed with the deal" by representations from Nicholson and his attorney that closing would occur on or before June 14. As phrased, the statements by Nicholson and Baron concerning a closing date clearly do not reveal intent to offer new concessions to the sellers as compensation for the purchasers' breach of the deposit stipulations in the contracts. Both statements merely tracked the terminology employed in paragraph 14(a) of the contracts in reference to the then scheduled expiration date of the commitments. Such statements only show agreement to do that which the purchasers were already legally liable at that time to do. *See In re Windle*, 653 F.2d 328, 331 (8th Cir. 1981); *R-Way Furniture Co.* v. *Powers Interiors, Inc.*, 456 S.W.2d 632, 637 (Mo. App. 1970). There is not any evidence to show that both parties agreed that acceptance of the delayed checks would be conditioned on a closing date on or before June 14, rather than on or before the expiration date of the commitments. *See Nicholls* v. *Kammerich*, 626 S.W.2d 653, 656-57 (Mo. App. 1981); *Campbell* v. *Richards*, 352 Mo. 272, ____, 176 S.W.2d 504, 505 (1944). Moreover, there was not a writing to modify the express terms of these contracts for the sale of land. *See Three-O-Three Investments, Inc.* v. *Moffitt*, 622 S.W.2d 736, 740 (Mo. App. 1981); *Gee* v. *Nieberg*, 501 S.W.2d 542, 544 (Mo. App. 1973); *John T. Brown, Inc.* v. *Weber Implement & Automobile Co.*, 260 S.W.2d 751, 755 (Mo. 1953). We thus find that the sellers voluntarily and unconditionally waived Nicholson's default under the deposit provisions of the contracts when DRG accepted and retained the personal checks for $40,000 and the sellers instructed DRG to continue to proceed toward closing. *See Three-O-Three Investments, Inc.* v. *Moffitt*, 622 S.W.2d at 740-42; *Plymouth Securities Co.* v. *Johnson*, 335 S.W.2d 142, 152 (Mo. 1960); *Johnson* v. *Farrow*, 594 S.W.2d 655, 658 (Mo. App. 1980); *Domyan* v. *Dornin*, 356 S.W.2d 70, 72 (Mo. 1962); 3A A. Corbin, *supra*, §§ 723, 755.

We also find that the contract closing date was effectively extended beyond June 14, 1979, when DRG, as agent of the sellers, requested and was granted an extension of the expiration date of the F.H.A. firm commitments. The purposes of the contracts and the language of paragraph 14(a) concerning closing did not mandate that the contract closings occur on or before June 14, 1979, once that was no longer the expiration date on the commitments. The financing arrangements under which these apartments were to be sold made it imperative that closing occur on or before the expiration of the F.H.A. firm commitments to insure the loans. Because the F.H.A. program made the transaction possible, time was of the essence. Paragraph 14(a) of the contracts reveals the parties' clear intent that closings on the sales and the loans would take place contemporaneously either on or before the expiration date of the commitments. *See Cochran* v. *Grebe,* 578 S.W.2d 351, 353-54 (Mo. App. 1979); *Johnson* v. *Schuchardt,* 333 Mo. 781, ____, 63 S.W.2d 17, 19 (1933). Significantly, the very terms of the F.H.A. commitments, incorporated into both contracts, contemplated possible extensions of the originally scheduled expiration date. When DRG extended the expiration date on the commitments, the contract parameters concerning time for performance were also extended in accordance with the plain language and express stipulations in the agreements. *See Standard Title Insurance Co.* v. *Union Pacific Insurance Co.,* 364 F.2d 287, 289 (8th Cir. 1966); *O.A. Talbott & Co.* v. *Byler,* 217 S.W. 852, 853 (Mo. App. 1920).

Until June 18, 1979, when DRG was discharged by the sellers, it was expressly authorized to act as the sellers' agent in all phases of application for the F.H.A. mortgage insurance commitment and to also act as F.H.A.-approved mortgagee.[14]

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[14] This finding of the trial court, 527 F. Supp. at 606, is based on an agreement entered on January 12, 1978, by Bill Bruce on behalf of the sellers with DRG.

Although the sellers were unhappy with the extension of the expiration date, they are bound by this act of their agent. Whether or not the extension request was actually authorized by the sellers, an issue disputed by the parties, DRG was cloaked with broad apparent authority to bind the sellers on all matters pertaining to the F.H.A. applications, including the extension. *See* Restatement (Second) of Agency §§ 8, 145 (1958). The sellers in fact, in a letter to DRG, stated that they were terminating the relationship on the ground that DRG "had previously agreed to act as our agent" but "the principal thrust of . . . [DRG's] . . . efforts have been to serve the interest of the buyer under contract."

The fact that DRG may have been a dual agent does not change this result. DRG was authorized to act in its various capacities with the knowledge and consent of both parties. *See Macalco, Inc.* v. *Gulf Insurance Co.*, 550 S.W.2d 883, 895 (Mo. App. 1977); *Burton* v. *Pet, Inc.*, 509 S.W.2d 95, 100 (Mo. 1974). DRG was not guilty of any misconduct, nor can it reasonably be said that it acted adversely to the sellers' interests or tortiously when it extended the expiration date. *See Thomason* v. *Miller*, 555 S.W.2d 686, 688 (Mo. App. 1977); *Cossairt* v. *Reich*, 370 S.W.2d 291, 295 (Mo. 1963); *Fuchs* v. *Leahy*, 321 Mo. 47, ____, 9 S.W.2d 897, 900 (1928). Both the purchasers and sellers had contract duties uncompleted at the time of the extension request;[11] both could reap possible benefits from an extension of the expiration date. *See Dillard* v. *Rowland*, 520 S.W.2d 81, 91 (Mo. App. 1974).

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[11] In a June 14, 1979, letter, David Dempsey, an attorney for the purchasers, advised the sellers that closing could not occur at that time, because, among other reasons: (1) the sellers failed to authorize DRG to sell the GNMA Securities on the open market, thereby establishing the discount points the sellers were to pay, or in lieu thereof, the sellers failed to obtain agreements from their existing mortgagees to accept GNMA Securities; (2) the sellers failed to authorize the existing mortgagees to release to the purchasers or DRG

Because the deposit breach was totally waived by the sellers and because the closing date on the contracts was effectively extended by sellers' agent, the purchasers cannot be denied the benefits of these contracts on the ground that they were the first to violate its terms. We find that the sellers wrongfully repudiated these contracts on June 14 when they declared a default under paragraphs 14(a) and 14(b) of the contracts. The sellers' actions given the purchasers a claim for damages for total breach. Restatement (Second) of Contracts § 253(1) (1981).

The district court held, 527 F. Supp. at 610, that even if the contract date had been extended to July 16, 1979, the purchasers would still be precluded from recovery because they failed to appear for closing on June 29, 1979, the date for closing set by their own attorney, and failed to demand that the seller close prior to July 16 when the F.H.A. commitments would expire.

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the amounts necessary to pay off the existing deeds of trust; and (3) the sellers failed to complete certain interior repairs on the Wellington Green Apartments and as a result the HUD inspection of these apartments could not be completed.

On the other hand, the sellers asserted that the purchasers had not submitted necessary documents to the F.H.A. in time for closing to occur June 14. The sellers also claimed, and the district court agreed, 527 F. Supp. at 608, 610, that purchasers had a duty to give sellers fifteen days notice of the date of closing, and if such notice had been given, the repairs would have been completed by June 14. The contract language in paragraph 14(b) that this court finding is based on, however, states: "*Place.* Settlement or closing hereunder shall be conducted by a person or firm designated by Purchaser, such designation to be by notice in writing given Seller not less than fifteen (15) days prior to closing hereunder." This provision merely requires that the agent to act for purchasers at closing be designated at least fifteen days before closing. An agent of DRG, Clyde Frame, admitted it was his responsibility to give the notice under this provision to the sellers. In May 1979 the agent had written contract with Joseph Baron, purchasers' attorney, concerning the closing, and so presumptively had knowledge of the closing agent's identity. Moreover, in light of our holding that the contract closings were effectively extended past June 14, 1979, no notice was required before the end of May 1979.

We find, however, that the sellers' total repudiation relieved the purchasers of any further contract duties. A tender by one party is waived where the other party declares a repudiation of the contract or takes any position which would render tender a "vain and idle ceremony." *Miran Investment Co.* v. *Medical West Building Corp.*, 414 S.W.2d 297, 303-04 (Mo. 1967); *see M.K. Metals, Inc.* v. *Container Recovery Corp.*, 645 F.2d 583, 588 (8th Cir. 1981); Restatement (Second) of Contracts §§ 253(2), 255 (1981). Likewise, the effect of a repudiation is not changed if the other party to a contract urges the repudiator to retract his repudiation or to perform despite his repudiation. Restatement (Second) of Contracts § 257 (1981).

We thus reverse and remand this case for further findings in accord with this opinion.

A true copy

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term 1982

No. 81-2413

Cedar Point Apartments, Ltd., etc., et al
Appellants

vs.

B & D Investment Corp., et al.
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

The Court, having considered appellees' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

December 22, 1982

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1982

No. 81-2413

Cedar Point Apartments, Ltd., etc., et al.,
Appellants,

vs.

Cedar Point Investment Corp., etc., et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

It is ordered by the Court that the mandate of this Court sent to the Clerk of the United States District Court for the Eastern District of Missouri is recalled as it was issued improvidently. The Clerk of that Court is directed to return the mandate to this Court.

It is further ordered by the Court that appellees' motion for stay of issuance of mandate is granted. Issuance of mandate is stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

January 10, 1983

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-1006-C (C)

John G. Ariko, as General Partner for Cedar Point Apartments, Ltd., a Limited Partnership,

Plaintiff,

v.

Cedar Point Investment Corporation, a Missouri Corporation,

and

Bill Bruce, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as General Partner in Bruce Properties Company, a Partnership,

and

Donald Ham, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as a General Partner in Bruce Properties Company, a Partnership,

and

Donn H. Lipton, individually; and as General Partner of Lipton-Millard II, Ltd.; and as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971; and as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973; and as Trustee of trust created for the benefit of Christina Ferer Millard under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973; and as Trustee of trust created for the benefit of Patricia Ferer under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973,

and

Robert B. Millard, individually; and as General Partner of Lipton Millard II, Ltd.,

and

McDonnell Douglas Corporation, a Maryland Corporation,

and

Christina Ferer Millard, as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971,

and

Patricia Ferer, as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973,

and

Gershman Investment Corporation, an Arkansas Corporation,

and

Community Federal Savings and Loan Association, a Corporation,

Defendants.

No. 79-1008-C (C)

Anthony J. Nicholson, as General Partner for Wellington Green Apartments, Ltd., A Limited Partnership,

Plaintiff,

v.

B & D Investment Corporation, a Missouri Corporation,

and

Bill Bruce, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as General partner in Bruce Properties Company, a Partnership,

and

Donald Ham, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as General Partner in Bruce Properties Company, a Parntership,

and

Donn H. Lipton, individually; and as General Partner of Lipton-Millard I, Ltd.; and as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971; and as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973; and as Trustee of trust created for the benefit of Christina Ferer Millard under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973; and as Trustee of trust created for the benefit of Patricia Ferer under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973,

and

Robert B. Millard, individually; and as General Partner of Lipton Millard I, Ltd.,

and

McDonnell Douglas Corporation, a Maryland Corporation,

and

Christina Ferer Millard, as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971,

and

Patricia Ferer, as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973,

and

Missouri Savings Association, a Corporation,

Defendants.

JUDGMENT

Findings of Fact and Conclusions of Law dated this date are hereby incorporated into and made a part of this judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be and is hereby entered in favor of each defendant and against the plaintiffs in Cause No. 79-1006-C (C) and Cause No. 79-1008C (C). These causes are dismissed with prejudice.

DATED this 30 day of October, 1981.

J. H. Meredith
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-1006-C (C)

John G. Ariko, as General Partner for Cedar Point Apartments, Ltd., a Limited Partnership,

Plaintiff,

v.

Cedar Point Investment Corporation, a Missouri Corporation,

and

Bill Bruce, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as General Partner in Bruce Properties Company, a Partnership,

and

Donald Ham, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as a General Partner in Bruce Properties Company, a Partnership,

and

Donn H. Lipton, individually; and as General Partner of Lipton-Millard II, Ltd.; and as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971; and as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973; and as Trustee of trust created for the benefit of Christina Ferer Millard under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973; and as Trustee of trust created for the benefit of Patricia Ferer under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973,

and

Robert B. Millard, individually; and as General Partner of Lipton Millard II, Ltd.,

and

McDonnell Douglas Corporation, a Maryland Corporation,

and

Christina Ferer Millard, as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971,

and

Patricia Ferer, as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973,

and

Gershman Investment Corporation, an Arkansas Corporation,

and

Community Federal Savings and Loan Association, a Corporation,

Defendants.

No. 79-1008-C (C)

Anthony J. Nicholson, as General Partner for Wellington Green Apartments, Ltd., A Limited Partnership,

Plaintiff,

v.

B & D Investment Corporation, a Missouri Corporation,

and

Bill Bruce, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as General partner in Bruce Properties Company, a Partnership,

and

Donald Ham, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as General Partner in Bruce Properties Company, a Parntership,

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Donn H. Lipton, individually; and as General Partner of Lipton-Millard I, Ltd.; and as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971; and as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973; and as Trustee of trust created for the benefit of Christina Ferer Millard under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973; and as Trustee of trust created for the benefit of Patricia Ferer under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973,

and

Robert B. Millard, individually; and as General Partner of Lipton Millard I, Ltd.,

and

McDonnell Douglas Corporation, a Maryland Corporation,

and

Christina Ferer Millard, as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971,

and

Patricia Ferer, as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973,

and

Missouri Savings Association, a Corporation,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is before the Court for a decision on the merits after trial to the Court. After consideration of the pleadings, testimony and exhibits introduced at trial, the parties' briefs and the applicable law, the Court makes the following findings of fact and conclusions of law. Any finding of fact equally applicable as a conclusion of law is adopted as such, and conversely, any conclusion of law equally applicable as a finding of fact is so adopted.

Findings of Fact

1. Cedar Point Apartments, Ltd., in Cause No. 79-1006-C (C) is a limited partnership organized and existing under the laws of the state of Florida. The Certificate of Limited Partnership was issued by the Florida Secretary of State on June 13, 1979. John G. Ariko, a citizen of the State of Florida, is its sole general partner and has brought suit herein in such capacity.

2. Wellington Green Apartments, Ltd., in Cause No. 79-1008-C (C), is a limited partnership organized and existing under the laws of the State of Florida. The Certificate of

Limited Partnership was issued by the Florida Secretary of State on June 13, 1979. Anthony J. Nicholson, a citizen of the State of Florida, is its sole general partner and has brought suit in such capacity.

3. Defendants Bill L. Bruce, Donald R. Ham, Donn H. Lipton and Patricia Ferer are citizens of the State of Missouri.

4. Defendants Robert M. Millard and Christina Ferer Millard are citizens of the State of New York.

5. Defendants B & D Investment Corporation and Cedar Point Investment Corporation are corporations duly organized and existing under the laws of the State of Missouri. Defendants Donald R. Ham and Bill L. Bruce are and have been since incorporation, the sole shareholders, directors and officers of each corporation.

6. Defendants Bill L. Bruce and Donald R. Ham are, and have been since formation, the sole partners of a partnership organized and existing under the laws of the State of Missouri, to-wit: Bruce Properties Company.

7. Wellington Green-Cedar Point is a limited partnership organized and existing under the laws of the State of Missouri. Its Certificate of Limited Partnership was executed on December 24, 1974 and was recorded with the Recorder of Deeds for St. Louis County, Missouri, on March 19, 1975. Its general partners from the date of organization to present are defendants Bill L. Bruce and Donald R. Ham. From December 24, 1974 to June 13, 1979, its limited partners were Harold B. Huhn and Nannett R. Huhn. On June 13, 1979, an Amended Certificate of Limited Partnership was executed, and from and subsequent to that date, the only limited partner of said partnership has been defendant Donald R. Ham. The amendment to the Certificate of Limited Partnership was filed with the Recorder of Deeds for St. Louis County, Missouri on June 14, 1979.

8. The Certificate of Limited Partnership of Wellington Green-Cedar Point at all times states that:

> "The character and purpose of the business of the limited partnership shall be to acquire, own, hold, manage, rent, lease, mortgage, encumber, and otherwise deal with certain parcels of real property, which parcels are hereinafter decribed, known as WELLINGTON GREEN APARTMENTS and CEDAR POINT APARTMENTS, and to do all other things necessary or incidental to such purposes."

9. Defendant McDonnell Douglas Corporation is and was a corporation duly organized and existing under the laws of the State of Maryland with its principal place of business in the State of Missouri.

10. In Cause No. 79-1008-C(C), defendant Missouri Savings Association was and is a corporation organized and existing by virtue of the laws of the United States with its principal place of business in the State of Missouri.

11. In Cause No. 79-1006-C (C), defendant Gershman Investment Corporation is and was a corporation duly organized and existing by virtue of the laws of the State of Arkansas with its principal place of business in the State of Missouri.

12. In Cause No. 79-1006-C (C), defendant Community Federal Savings and Loan Association was and is a corporation duly organized and existing by virtue of the laws of the United States with its principal place of business in the State of Missouri.

13. From January 11, 1979 to August 10, 1979, defendant B & D Investment Corporation in Cause No. 79-1008-C (C) held record title to the real property known as the Wellington Green Apartments, whose legal description is correctly set forth as follows:

A tract of land in the Southwest 1/4 of SECTION 6, TOWNSHIP 46 NORTH, RANGE 7 EAST, and described as follows: Beginning at the Northeast corner of property conveyed to St. Louis County, Missouri by deed recorded in Book 4525 Page 619; thence along the North line of said property, North 89 degrees 29 minutes West, 416.90 feet to the Northwest corner thereof in the East line of Property conveyed to Laura H. Schmitt and husband by deed recorded in Book 503 Page 163; thence along said East line, North 1 degree, 28 minutes East, 168.71 feet to the Northeast corner of said Schmitt property; thence along the North line of said property, North 89 degrees 29 minutes West, 104.3 feet to the Northwest corner thereof; thence North 1 degree 28 minutes East, 1831.40 feet to a Southwestern corner of property conveyed to Orville Behle by deed recorded in Book 3956 Page 464; thence along the Southern line of said Behle property, South 34 degrees 37 minutes East, 649.50 feet and South 64 degrees 22 minutes East, 110.5 feet to the Southeast corner thereof; thence South 0 degree 02 minutes East, 1421.78 to the point of beginning.

On August 10, 1979, by general warranty deed, Defendant B & D Investment Corporation purported to transfer all of its right, title and interest in said real property to the Wellington Green-Cedar Point, a Missouri limited partnership. Said warranty deed was recorded with the Recorder of Deeds for St. Louis County, Missouri on August 14, 1979.

14. From January 11, 1979 to August 10, 1979, defendant Cedar Point Investment Corporation held record title to the real property known as the Cedar Point Apartments, whose legal description is correctly set forth as follows:

A tract of land in U. S. Survey 110, Township 46 North, Range 7 East, and described as follows: Beginning at the intersection of the North line of Chambers Road and the

East line of Crown Point Drive, said East line also being the West line of U. S. Survey 110, thence along the East line of Crown Point Drive, North 8 degrees 17 minutes 04 secords East 1049.78 feet to a point in the center line of creek; thence along the center line of said creek the following courses and distances: South 15 degrees 54 minutes 45 seconds East, 22.23 feet, South 81 degrees 12 minutes East, 49.82 feet, North 82 degrees 47 minutes East 114.25 feet, North 24 degrees 38 minutes East 39.05 feet and South 78 degrees 13 minutes East 74.61 feet to a point in the West line of Pepper Lane Amended Subdivision as per plat book 73 page 36, thence along the West line of said Pepper Lane Amended Subdivision, South 1 degree 05 minutes East, 1045 feet to a point in the North line of Chambers Road, and thence along the North line of Chambers Road, the following courses and distances, North 89 degrees 57 minutes West, 407.01 feet to a point, North 0 degrees 03 minutes East, 5 feet, North 89 degrees 57 minutes West, 10 feet, South 0 degrees 03 minutes West, 5 feet and North 89 degrees 57 minutes West, 12 feet to a point of beginning according to survey by Volz Engineering and Surveying Co. during April 1971, now known as CEDAR POINT, as per plat thereof recorded in Plat Book 139 page 53 of the St. Louis County Records.

On August 10, 1979 by general warranty deed defendant Cedar Point Investment Corporation purported to transfer its right, title and interest in said real property to the Wellington Green-Cedar Point, a Missouri limited partnership. Said warranty deed was recorded with the Recorder of Deeds for St. Louis County, Missouri on August 14, 1979.

15. On August 20, 1979, the plaintiff in Cause No. 79-1006-C (C) filed with Recorder of Deeds for St. Louis County, Missouri, a Notice of Lis Pendens. The Notice of Lis Pendens was recorded with the Recorder of Deeds for St. Louis County, Missouri, and is recorded in Book A-8, page 315-316.

16. On August 20, 1980, the plaintiff in Cause No. 79-1008-C (C) filed with the Record of Deeds for St. Louis County, Missouri, a Notice of Lis Pendens. The Notice of Lis Pendens was recorded at Book A-8, page 313-314.

17. On January 12, 1978 Bill L. Bruce entered into an agreement on behalf of Bruce Properties Company with DRG Financial Corporation whereby DRG Financial Corporation would act as agent for Bruce Properties in all phases of application for F.H.A. Mortgage Insurance Commitment and whereby DRG Corporation would also act as F.H.A. approved mortgagee in processing F.H.A. insured loans on the Wellington Green Apartments and Cedar Point Apartments projects.

18. On April 7, 1978 Bill L. Bruce on behalf of Bruce Properties Company entered into two agreements with Thomas L. Barken Investment Company, Inc. and DRG Financial Corporation whereby DRG and Thomas L. Barken Investment Company, Inc. were given the exclusive right to sell, assign, and/or exchange Bruce Properties' interests in the Wellington Green Apartments and Cedar Point Apartments.

19. On January 11, 1979, defendants B & D Investment Corporation and Cedar Point Investment Corporation by their duly authorized officer, defendant Ronald R. Ham entered into contracts for the sale of the Wellington Green Apartments and the Cedar Point Apartments to Anthony J. Nicholson and/or assigns. Prior to January 22, 1979, Anthony J. Nicholson executed the same contracts.

20. Prior to the execution of the final contracts for sale of the Wellington Green and Cedar Point Apartments, there had been preliminary negotiation between the sellers (B & D Investment Corporation and Cedar Point Investment Corporation) by defendants Ham and Bruce and Anthony J. Nicholson and John G. Ariko. These preliminary negotiations commenced in October, 1978, and were conducted through DRG Financial Corporation. In the latter part of 1978, Ham, Bruce, Nicholson

and Ariko participated in direct negotiations which had been arranged by DRG Financial Corporation and Thomas L. Barken. At various times during the after contract negotiations, Ham, Bruce, Nicholson and Ariko discussed and agreed that the contracts for the two apartment complexes would be assigned to two Florida limited partnerships to be formed; and that DRG Financial Corporation could act as mortgagee for the purchasers. At that time Anthony J. Nicholson and John G. Ariko personally viewed the properties and were furnished and reviewed various financial documents and records relating to the properties.

21. Paragraph 4 of each contract for sale, specified that the purchaser was to deposit as an earnest money deposit with DRG Financial Corporation the sum of Twenty Thousand Dollars ($20,000.00) for each contract. The earnest money deposit was to be represented by an irrevocable letter of credit in favor of the seller. Further, said earnest money deposit was to be made no later than January 30, 1979.

22. On February 12, 1979, Anthony J. Nicholson tendered two (2) personal checks, No. 2133 and No. 2134, each in the amount of Twenty Thousand Dollars ($20,000.00) to DRG Financial Corporation. Nicholson accompanied his tender with instructions to hold the checks until he gave verbal authorization to cash them. Also on February 12, 1979, Nicholson stated to DRG that he would be offering the sellers a Florida bank letter certifying that the funds for the checks were available upon default. Said checks were never cashed or deposited by DRG Financial Corporation.

23. On March 8, 1979, the Florida National Bank at Orlando issued a letter addressed to Gunner Plake at DRG Financial Corporation whereby the bank stated Nicholson had a line of credit with the bank sufficient in amount to provide for a Forty Thousand Dollar ($40,000.00) advance. The bank agreed to forward Forty Thousand Dollars ($40,000.00) to DRG Financial

Corporation from the line of credit of Anthony J. Nicholson upon notice by DRG Fiancial Corporation to the bank of default by Nicholson under the terms of the sales contracts. In early March, 1979, a representative of Florida National Bank read the letter to Bruce over the telephone. A copy of this bank letter was subsequently delivered to sellers' offices by Thomas Barken, sellers' agent.

24. On May 10, 1979, defendants Cedar Point Investment Corporation and B & D Investment Corporation sent to DRG Financial Corporation a mailgram which stated that they considered the Florida National Bank letter unsatisfactory to meet the requirements of paragraph 4 under the sales contracts, and instructed DRG Financial Corporation to obtain contract compliance.

25. On May 11, 1979 DRG Financial Corporation sent by mail to Anthony J. Nicholson a copy of defendants' May 10th mailgram together with a letter requesting that Nicholson forward to DRG Financial Corporation either a certified check in the amount of Forty Thousand Dollars ($40,000.00) or an irrevocable letter of credit in favor of the sellers by 5:00 p.m. Eastern Daylight time on May 16, 1979.

26. On May 15, 1979, Anthony J. Nicholson sent to DRG Financial Corporation a mailgram in which he protested defendants' request for a Forty Thousand Dollar ($40,000.00) cash deposit on or before May 16 and stated that the Florida bank letter had been accepted by Bill Bruce as complying with the contracts of sale.

27. On May 17, 1979, Anthony J. Nicholson mailed two (2) personal checks, No. 372 and No. 2216, totalling Forty Thousand Dollars ($40,000.00) to DRG Financial Corporation for earnest money deposit on the purchase of the Wellington Green and Cedar Point Apartments. These checks were received by DRG Financial Corporation, subsequently cashed, and the funds were held by DRG Financial Corporation as earnest money deposit up to and until December 5, 1979.

28. Shortly after receiving Nicholson's checks of May 17, 1981, DRG Financial Corporation informed sellers of the receipt of the checks. Sellers' local sales agent, Thomas Barken, informed Donald R. Ham that the funds had been received. Ham then instructed Barken to continue to work toward a closing under the contracts for sale. Sellers also told DRG's Washington agent, Clyde Frame, to proceed to closing under the contract. Sellers were induced and persuaded to proceed with the deal and convey the property to the purchaser Nicholson based upon the representations by Nicholson that closing would occur on or prior to June 14, 1979, the date the commitments to insure were scheduled to expire.

29. A substantial portion of the purchase price provided in each contract was to be funded by notes secured by first deeds of trust. These notes were to be insured by the Federal Housing Administration, pursuant to the provisions of Section 223(f) of the National Housing Act. The balance of the purchase price was to be paid by cash at closing, the earnest money deposit and certain capital surplus notes. Commitments to insure the primary funding were obtained from the Federal Housing Administration and were issued on March 16, 1979. Said commitments, by their terms, expired ninety (90) days after issuance, which was June 14, 1979.

30. On June 8, 1979, DRG Financial Corporation requested the Federal Housing Administration to extend each of said commitments to insure for a period of thirty (30) days. On June 11, 1979 the Federal Housing Authority extended each commitment to insure until July 16, 1979.

31. The extensions to the Federal Housing Administration commitments to insure did not automatically extend the contracts or the time for closing.

32. DRG Financial Corporation, as mortgagee, was to finance the purchaser of the properties through the sale of "GNMA" securities. However, the only demand DRG Finan-

cial Corporation ever made on sellers to furnish commitments in writing from the present lenders or to authorize the sale of the securities on the open market was by letter dated June 13, 1979.

33. Paragraph 14(b) of each contract for sale provided:

> "Settlement or closing hereunder shall be conducted by a person or firm designated by purchaser, such designation to be by notice in writing given seller not less than fifteen (15) days prior to closing hereunder."

The only written notice that sellers received concerning closing was a letter dated June 13, 1979 from David Dempsey, one of purchaser's attorneys, setting closing for June 29, 1979 at the St. Louis HUD office.

34. In order to close the mortgage loans insured by the Federal Housing Administration, the purchaser had a duty to submit numerous documents to the Federal Housing Administration for their review and approval as part of any closing. Said documents included instruments creating the mortgagor entity, deeds of trust, security agreements, a mortgagor's certification as to actual costs, and a financing plan.

35. The purchaser or his representative did not submit all documents to the Federal Housing Administration in sufficient time for the closings to occur on or prior to June 14, 1979. Specifically, the mortgagor's certification as to actual costs and financing plans were not received by FHA until June 18, 1979. In addition, revised notes, deeds of trust, and other documents were not submitted to FHA for its approval until after June 22, 1979.

36. All required FHA repairs on the Cedar Point Apartments had been completed and approved by FHA by June 5, 1979. On June 12, 1979 FHA inspected the repairs on the Wellington Green Apartments and noted in an inspection report that certain interior and exterior items needed completion. The interior items needing completion were minor "punch-type" items. Had

the sellers been given notice on or before May 30, 1979 that closing was set for June 14, 1979, the remaining repairs could have been completed except for those exterior repairs for which FHA would have escrowed sufficient funds to cover the cost of completion.

37. The sellers appeared at the F.H.A. offices on the morning of June 14, 1979. At that time they learned that the HUD commitments to insure had been extended at the request of DRG Financial Corporation and that the purchaser had failed to submit all of the required documents to F.H.A. for review. Late in the afternoon on June 14, 1979, after leaving the F.H.A. offices, the sellers notified DRG Financial Corporation by letter that the contracts were terminated in light of the default by purchaser.

38. Neither the purchaser nor a representative of the purchaser appeared for closing on June 29, 1979 at the regional office of the United States Department of Housing and Urban Development in St. Louis as per the previous notification from the purchaser that closing would occur at that date and place. Neither the purchaser nor a representative of the purchaser ever made demand upon the sellers, orally or in writing, that the sellers honor the contracts and convey the property to the purchaser or his assign, either on June 29, 1979 or at some time prior to the expiration of the commitments to insure as they had been extended to July 16, 1979.

39. Had the purchaser or a representative of the purchaser appeared for closing at the time specified on June 29, 1979 and had the purchaser met all of the obligations under the contracts for sale, B & D Investment Corporation and Cedar Point Investment Corporation were prepared to close and convey title to the purchaser or his assigns on that date.

40. Paragraph 28 of each contract for sale provides:

"Purchaser shall have the right to assign this agreement to any partnership of which it is a general partner; provided however, that purchaser shall have such right of assignment only if such assignee or transferee shall in writing expressly assume and agree to perform and discharge each and every obligation and liability of purchaser set forth in this agreement."

On June 8, 1979, Anthony J. Nicholson, as purchaser, executed assignments purporting to convey all of his right and interest in the contracts for sale as purchaser to the plaintiffs, the limited partnerships, respectively. At no time have plaintiffs in writing expressly agreed to assume and perform and discharge the obligations and liabilities of the purchaser. The evidence adduced simply showed that the limited partnerships, as purchasers, under the terms of the partnership agreement were authorized and empowered to assume the obligations and liabilities of the purchaser. Plaintiffs' evidence that they were prepared to agree in writing to assume the obligations and liabilities at closing does not comply with the terms and conditions of the contracts for sale.

Conclusions of Law

1. The Court has jurisdiction over these actions pursuant to 28 U.S.C. § 1332 in that there is total diversity of citizenship between plaintiffs and defendants and the amount in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars ($10,000.00).

2. Plaintiffs Cedar Point Apartments, Ltd. and Wellington Green Apartments, Ltd. lack standing to sue on the January 11, 1979 contracts because the assignments of the contracts to them by Anthony J. Nicholson are void. The January 11, 1979 contracts contain express limitations on the power to make assignments. Prohibitions or limitations in a bilateral contract on the right to assign are valid, binding, and enforceable. 6 Am. Jur. 2d, Assignments, § 22. Anthony J. Nicholson failed to

comply with the assignment clause in the contracts in that he never obtained written agreements from plaintiffs that they would perform each and every obligation of "purchaser" set forth in the contracts. Anthony J. Nicholson further failed to comply with the assignment clause in the contract for Cedar Point Apartments in that he is not a general partner in the Cedar Point Apartments, Ltd. partnership.

Plaintiffs have attempted to avoid these defects in the assignments by arguing that the assignment provisions in the contracts do not apply to them. Their argument is based on the language in the preamble to the contracts which defines "purchaser" as "Anthony J. Nicholson and/or assigns." Plaintiffs assert that they are actually "purchasers" within the meaning of this language and therefore that the assignment stipulations do not govern them. There is no basis for this argument. Reading the contracts as a whole, it is apparent that the assignment provisions were intended to apply equally to all assignees, including those taking directly from Mr. Nicholson as "purchaser."

Plaintiffs further argue that even if the assignment provisions do apply to them, those provisions have lost their effect. Their argument is premised on authority which holds that when assignees have rendered full performance on a contract or when such performance is presently offered, contractual stipulations regarding assignments are no longer binding and may not be invoked by defendants to avoid the contract. This rule was applied by the Eighth Circuit Court of Appeals in *Cheney* v. *Bilby*, 74 F. 52, 64 (8th Cir. 1896), *cert. denied* 164 U.S. 705, 17 S.Ct. 992 (1896). It appears to be based on the notion that the purpose of assignment restrictions is to safeguard performance on the part of the purchaser, so that once performance has been assured, the restrictions become of no further consequence. *See, e.g., Lambert Incorporated* v. *Starbrand Sales Corp.*, 422 F.2d 621, 625 (7th Cir. 1970).

The *Cheney* rule is not applicable to this case. Here, purchaser had repeatedly failed to comply with the terms of the contracts. Therefore, sellers lacked adequate assurance that full performance could be given and were entitled to compliance with the assignment stipulations. Such compliance being absent, the assignments must fail.

Finally, plaintiffs argue that the assignment provisions do not bar these actions because those provisions have been waived by defendants. This contention is without support. The record shows that defendants were aware that assignments were contemplated, but they at no time indicated that such assignments would be permitted without the written assurances provided for in the contract.

3. Assuming, *arguendo,* that plaintiffs have standing to bring these actions for the purported breach of contracts for sale, plaintiffs nevertheless cannot claim the contracts' benefits. The purchaser, Anthony J. Nicholson, breached the contracts by failing to deposit irrevocable letters of credit in favor of seller with DRG Financial Corporation on or prior to January 30, 1979. Although purchaser ultimately tendered checks as an earnest money deposit, those checks were personal, not certified. Although purchaser submitted a bank letter, that letter did not constitute an irrevocable letter of credit. Purchaser's personal checks and bank letter thus failed to comply with the specific language and terms of the contracts. Sellers bargained for clear guarantees of payment and were entitled to receive them. They did not.

Although sellers did accept purchaser's late tender of personal checks and the bank letter, that acceptance did not constitute a total waiver of purchaser's breach. Sellers specifically conditioned any further agreement to complete the sales and to convey the property to the purchaser or a valid assignee on the fact that closing occur on or prior to June 14, 1979, the then scheduled expiration date of the F.H.A. commitments to in-

sure. Purchaser again failed to comply. Purchaser did not give the notice required by the contract fifteen days in advance of June 14, 1979, nor did purchaser submit the necessary documents to the F.H.A. in sufficient time for the closing to occur on June 14, 1979.

Purchasers have claimed that by obtaining an extension of the F. H. A. firm commitments to insure until July 16, 1979, DRG Financial Corporation, as agent for sellers, extended the contract date and closing date to July 16, 1979. Such an interpretation is not compelled by the language of the contracts. Even if it were, plaintiffs would nonetheless still be precluded from recovery, because purchaser failed to appear for closing on June 29, 1979, the date set by its attorney, and failed to make demand upon sellers that they close prior to the time the F.H.A. commitments, as extended, expired on July 16, 1979.

The law is well settled that a party to a contract cannot claim its benefits where he is the first to violate its terms. *S. G. Adams Printing and Stationery Company* v. *Central Hardware Company,* 572 S.W.2d 625 (Mo.App. 1978), *Nabato* v. *Sletten,* 560 F.2d 340 (8th Cir. 1977). Because purchaser was the first to violate these contracts, judgment must be entered against the plaintiffs on their claims for damages under the contracts and for specific performance.

4. Likewise, judgment must be rendered against plaintiffs on their claims for tortious contractual interference and civil conspiracy. Where a party has breached a contract, the contract is void with regard to the other parties to it. Accordingly, no action for tortious interference or conspiracy will lie with respect to that contract. *See, e.g., McNamor* v. *Baltimore & Ohio Chicago Terminal R. Co.,* 254 F.2d 717 (7th 1958); RESTATEMENT (SECOND) OF TORTS, § 766, Comment P.

5. Because judgment is being rendered against plaintiffs on the above claims, it is unnecessary for this Court to address the validity of plaintiffs' lis pendens notices.

DATED this 30 day of October, 1981.

J. H. Meredith
UNITED STATES DISTRICT JUDGE

APPENDIX E

[632] Ham - Direct

A. Some time after the deadline that we had set in our mailgram, I had occasion to talk with Mr. Frame.

Q. Now, that deadline was May 16, close of business 5:00 P.M.?

A. That's correct.

Q. Okay.

A. Some time after that I had occasion to talk with Mr. Frame, and in this instance I remember it was him and not Mr. Plake. At that point we both assumed the deal was dead. We had notified the purchasers that they hadn't responded, that it was a failure to perform under the contract. Mr. Frame assumed it and I assumed it.

We discussed then where do we go from here and he advised me that his marketing people would be in touch with us immediately to prepare a revised sales package and be on the streets within a week or so.

Q. That advice was, then came in the form of some writing also. Is that what Exhibit V is?

A. Yes.

Q. And that exhibit is dated May 17th?

A. Correct.

Q. And he talks in terms of being on the street with some remarketing, did you say, by May 25?

A. That's true.

* * * * * * *

[635] Q. Okay. Does Mr. Frame indicate that the checks have cleared or that they have been deposited, or anything of that nature?

A. In Exhibit Y?

Q. Yes.

A. Yes. He says, "These checks have been deposited in our trustee account."

Q. Okay. Now, by the time you received that letter, May 25, the letter dated May 25 you received, I presume some time thereafter, and when you received it you then had in hand by that time not only that letter of Frame's of the 25th, Exhibit Y, but also the mailgram of Nicholson's Exhibit S telling you they intended to close by June 16 and you also had in hand Exhibit X then, Baron's letter, indicating to you that closing will be accomplished prior to the scheduled expiration of the HUD commitment. Is that correct, Mr. Ham?

A. That is correct.

Q. At that point then in late May, as a result of the representation by DRG that they had dollars, checks that had at least been deposited, and the letter from Baron and the prior communications from Nicholson, what was your posture as it related to the matter?

A. Well, shortly before, or shortly after receiving [636] this letter dated the 25th, I had at least one conversation with Clyde Frame. I can't place the date exactly. The subject of that conversation was that in light of the fact, and these are as close as I can come to Mr. Frame's words, in light of the fact that they had money, that they had confirmations of intentions from all of the necessary parties, at least the ones he felt were necessary, the purchaser, this Joseph Baron, an attorney, their own feeling that this job could be closed within the scheduled expiration date, he felt like and suggested that we go ahead and try to close these transactions.

We talked quite a bit about it, and he convinced me that there wasn't much that could be done on the remarketing effort anyway between May 25 or 6th or whenever I had this conversation, between then and June the 14th and that we might as well go ahead and see if Nicholson could close, to which I agreed.

Q. Okay. So that as a result of the conversation and the three items, the letter of Frame's, the letter of Baron's and the Nicholson telegram, you agreed then to move forward with it?

A. True.

Q. Now, were you mindful — were you mindful of the contract provisions relative to written notices to you all * * *

* * * * * * *

[642] A. I saw Mr. Vanover on a daily basis.

Q. And were you conversant with the progress being made with these two projects on a daily basis?

A. I'm not sure that I was conversant with what was going on on a daily basis. I saw him, I think, if there was something to talk about, I would say something to him or he would say something to me.

Q. Did you visit the properties during this period?

A. Yes, I did.

Q. With what degree of frequency? Are you able to estimate for me?

A. I would say at least once a week, some weeks more and some weeks maybe I missed a week or two.

Q. Now, from the first of June, 1979 down to the morning of the 14th of June, 1979, did you have any contact with anyone concerning these transactions other than people with whom you were associated that you can recall?

A. From the first of June until the 14th of June?

Q. Yes.

A. I had a contact with Mr. Dempsey during that period of time.

Q. Tell me about that.

A. I had been away for a few days, as I recall — I don't know how long — maybe two days, three days, and when [643] I came back I had a message to call Dave Dempsey. I have known Dave for quite a while, so at that point I didn't know why he was calling, I called him and he wanted to talk about some problems with the Wellington Green, Cedar Point deal, and he mentioned inspections being a big problem, and it was during that conversation that, that I asked Dave why, why we at that late date had not received a notice to close these two jobs, because according to my calendar we were supposed to close on the 14th and we were well past that, and I was questioning why we hadn't received our 15-day notice.

That was about it. We covered — we talked in general terms about his relationship with Mr. Nicholson, talking about the inspection problem.

Q. Okay. Now, let's talk a moment about that. The inspection problem, the inspection by the purchasers of the premises, that what you are relating to?

A. Yes.

Q. Had — after the contract of — after the contracts had been executed in January, had there been any contract of any kind over the phone, in person or whatever, between you and the purchasers relating to the inspection of premises or records or anything of that nature?

A. Had there been any conversations about that?

* * * * * * *

[665] me when you got it?

Let me put it this way to you, sir. Had you seen it before you went to the HUD offices on the 14th?

A. No. I had not seen it before that visit.

Q. Can you tell me when you had seen it prior to writing your letter of the 14th which was, I think, Exhibit CC?

A. No, I can't tell you that.

Q. Okay. Now, the other exhibit, the third exhibit that I then handed you is what, sir?

A. BB.

Q. And is that a letter likewise from Dempsey?

A. Yes, it is.

Q. And is that a letter that in effect talks about giving you a 15-day notice and setting a closing on June 29, 1979?

A. Yes.

Q. And that letter is a followup or is, or follows, let's put it that way, it follows your conversation with Dempsey that you've talked about wherein you made mention to him that you had not received a 15-day notice for a closing. True?

A. True.

Q. Does it correctly relate your position in that conversation with him at that time?

[666] A. No, it does not.

Q. I will hand you Defendants' Exhibit DD and ask you, sir, does that letter from you to Dempsey under date of June 15, 1979 represent your position?

A. Yes, it does.

Q. And what is that position?

A. The position is that Mr. Dempsey has misinterpreted what —

MR. WITZEL: Your Honor, I'm going to object. The letter speaks for itself. Mr. Ham wishes to testify what the letter says he can read the letter into the record.

MR. LOVE: That's satisfactory. I was simply trying to shorten it a little bit.

Read it into the record, please.

A. "Mr. David G. Dempsey, 11 South Meramec Avenue, St. Louis, Missouri, 63105.

"Regarding: Your Letter to Cedar Point Investment Corporation and B & D Investment Corporation dated June 14th, 1979.

"Dear Mr. Dempsey:

"In the above referenced letter you state, among other erroneous claims, that 'Mr. Ham insisted that you be given a 15-day notice of the proposed closing [667] date under the sale contracts'. "To set the record straight, Mr. Ham during the subject conversation did not demand anything, much less a closing date two weeks after the expiration of the appropriate HUD commitments to insure. The only reason for discussing the 15-day notice provision to begin with was simply to question your client's intentions.

"It should be quite obvious that your client had no intentions of closing prior to the scheduled expiration date of the HUD commitments to insure, otherwise, we would have received notice to that effect on/or before May 30th, 1979.

"Very truly, Cedar Point Investment Corp."

I dont' have a signature, but I know I signed it.

Q. Did you make any contact of the offices of HUD on that date?

* * * * * * *

[671] you got into the tail end of May, May 25, 26, whenever and had a little correspondence with Frame and received the copies of the Nicholson mail-o-gram concerning that he would close by June 16 and the Baron letter that his clients were going to close before the expiration of the commitment, and Frame advised you he had $40,000 deposited to his escrow account, at that time you agreed then to proceed, if the transaction were closed, by the expiration of the commitment on June 14th. Was that your position, Mr. Ham?

A. That was not only a position. That was an agreement that I felt like I reached with Mr. Frame over the phone. I outlined to Mr. Frame the, the problems, some of the problems it would cause us if this job did not close within that time, and he indicated to me not to worry about it, that Nicholson either closed the deal or he didn't, but in any event we would know by the 14th of June what was going to happen.

It never was anticipated that it would take beyond the 14th to either get on this deal or get off of this deal.

Q. What were some of the problems that an extension beyond that date would have caused you?

A. Depending on the legnth of that extension, there was substantial secondary financing on both of these properties. That financing, for various reasons, was becoming a problem.

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JOSEPH N. BARON
(ADMITTED FLORIDA & DISTRICT OF COLUMBIA)

May 22, 1979

Mr. Clyde D. Frame, Esq.
DeFranceaux Realty Group, Inc.
1909 K St., NW
Suite 200
Washington, D.C. 20006

Re: Wellington Green/Cedar Point Apts.
St. Louis, Mo.

Dear Clyde:

Pursuant to our continuing discussions and instructions from our client Mr. Nicholeon, please cause your files to reflect the following:

1. It is the bona fide intent of said purchaser in these transactions to proceed with their consummation by way of the contemplated 223 (f) initial/final closings and under the existing terms of the respective Sales Contracts, dated January 11, 1979;

2. Said purchaser is now, and always has been, fully able to consummate these transactions according to their terms as written;

3. Said closings will be accomplished prior to the scheduled expiration of HUD's commitments to insure.

Most sincerely,

J.N. Baron

Defendants' Exhibit X

Office-Supreme Court, U.S.
FILED
MAR 14 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CEDAR POINT INVESTMENT CORPORATION, *et. al.*,
Petitioners,

v.

CEDAR POINT APARTMENTS, LTD.,
a limited partnership,
by JOHN G. ARIKO, its general partner,
Respondent.

and (Consolidated with)

B & D INVESTMENT CORPORATION, *et. al.*,
Petitioners,

v.

WELLINGTON GREEN APARTMENTS, LTD.,
a limited partnership
and ANTHONY J. NICHOLSON, as general partner,
Respondent.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Appendix A A-1

Opinion by the United States Court of Appeals for the Eighth Circuit

Appendix B A-23

Judgment, Findings of Fact and Conclusions of Law by the United States District Court, Eastern District of Missouri

TABLE OF AUTHORITIES

Cases:

Baker v. St. Paul Fire & Marine Ins. Co., 427 S.W. 2d 281 (Mo. App. 1968) 6

Busch & Latta Painting Corp. v. State Highway Commission, 597 S.W. 2d 189 (Mo. App. 1980) 5

Commerce Trust Co. v. Howard, 429 S.W. 2d 702 (Mo. 1968) 5

Harber v. Ohio National Life Ins. Co., 512 F. 2d 170 (8th Cir. 1975) 5

Harris v. Union Electric Co., 622 S.W. 2d 239 (Mo. App. 1981) 5

Mackey v. Randolph Macon Coal Co., 178 F. 881 (C.C.A. Mo. 1910) 5

Murphy v. Carron, 536 S.W. 2d 30 (Mo. en banc. 1976) 4

Pullman-Standard v. Swint, 456 U.S. 273, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982) 4

Robino v. Norton, 682 F. 2d 192 (1982) 4

S.S. Silverblatt, Inc. v. Seaboard Surety Co., 417 F. 2d 1043 (8th Cir. 1969) 6,7

Slotkin v. Willmering, 464 F. 2d 418 (8th Cir. 1972) 5

Speilberg Mfg. Co. v. Direct Sales Intern., Inc., 566 S.W. 2d 839 (Mo. App. 1978) 4

State ex rel. Schnieder v. Stewart, 575 S.W. 2d 904 (Mo. App. 1978) 5

Weltscheff v. Medical Center of Independence, Inc., 604 S.W. 2d 796 (Mo. App. 1980) 5

Rules:

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No. 82-1334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CEDAR POINT INVESTMENT CORPORATION, *et. al.*,
Petitioners,

v.

CEDAR POINT APARTMENTS, LTD.,
a limited partnership,
by JOHN G. ARIKO, its general partner,
Respondent.

and (Consolidated with)

B & D INVESTMENT CORPORATION, *et. al.*,
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v.

WELLINGTON GREEN APARTMENTS, LTD.,
a limited partnership
and ANTHONY J. NICHOLSON, as general partner,
Respondent.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully request that the Court deny this Petition for Writ of Certiorari, seeking review of the decision of the United States Court of Appeals for the Eighth Circuit entered in this action November 17, 1982.

STATEMENT OF THE CASE

While detailed statements of the facts of this case are contained in the opinions of the District Court and the Eighth Circuit Court of Appeals, included in the appendix of this Brief, Respondent would like to summarize the present posture of the case to clarify Petitioner's Statement of the Case. It must be remembered that the purpose of this brief is to address Petitioner's application for a Writ of Certiorari, it is not intended as a brief on the merits of this case.

This case involves two suits, which were consolidated in the District Court, concerning contracts for the sale of two (2) apartment complexes known as the Wellington Green Apartments and the Cedar Point Apartments in St. Louis, Missouri. Petitioners are the original Defendants (herein Sellers). Sellers employed DRG Financial Corporation to act as their agent to find a purchaser for the properties and to process an application for FHA financing under the 223 (F) program. (FOF No. 17 App. p. A-34).[1] Respondents (herein Purchasers) were the prospective purchasers of the properties.

In January, 1979, Sellers entered into a contract for the sale of the Wellington Green Apartments and the Cedar Point Apartments to Respondents. After prolonged and complicated transactions between the Sellers, their agent DRG, and Purchasers, negotiations broke down and on June 14, 1979 Sellers declared Purchasers in default and on June 18, 1979 the Sellers terminated their relationship with DRG.

Purchasers brought the original action in this case on August 17, 1979 seeking specific performance of the contracts, damages equal to additional financing costs, actual damages for breach

---

[1]References to various paragraphs in the Findings of Fact of the District Court will be denominated as "FOF ____".

of contract, and actual and punitive damages for tortious interference with the contracts and conspiracy to interfere with the contracts.

Trial was held, without a jury, before the Honorable James H. Meredith, United States District Judge. On October 30, 1981, the District Court dismissed both actions with prejudice after making Findings of Fact and Conclusions of Law. (District Court's opinion is attached as Appendix B App. p. A-23). The District Court held that Plaintiffs lacked standing to bring the suit and further that Sellers only partially waived Purchasers initial breach of the contract and that the extension of FHA loan committments did not extend the closing date of the contract. The District Court held that Purchasers breached the contract and Sellers declaration of default on June 14, 1979 was correct.

Purchasers appealed to the Eighth Circuit Court of Appeals. The Court of Appeals, on November 17, 1982, reversed the decision of the District Court. Specifically, the Court of Appeals held that the Respondent Purchasers had standing to bring the original suit and that Sellers' acceptance of Purchasers' earnest money deposit was a complete waiver of Purchasers' initial breach of the contract and that DRG acted as agent for sellers in extending the date of the expiration of the FHA firm loan committments which automatically extended the contract closing date. Therefore, Sellers wrongfully repudiated the contracts by declaring Purchasers in default on June 14, 1979.

Petitioners now seek a Writ of Certiorari, on the grounds that the Court of Appeals violated the "clearly erroneous" standards of Rule 52(a), Federal Rules of Civil Procedure.

REASONS FOR DENYING THE WRIT

I.

The Court Of Appeals Did Not Exceed The Scope Of Rule 52(a) FRCP In That Its Decision Concerns Matters Of Law And A Finding By The District Court That Is "Clearly Erroneous".

Petitioners assert that the Eighth Circuit is "still applying the *Strecker* standard" which provided that an "ultimate fact" was independently reviewable by the Appellate Court regardless of Rule 52. An Eighth Circuit panel has recently stated that *Strecker* has been implicitly overruled by *Pullman-Standard* v. *Swint,* 456 U.S. 273, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982). *Robino* v. *Norton,* 682 F. 2d 192, 195 (1982). There is nothing in the Court of Appeals decision, attached hereto as Appendix A (App. p. A-1) to indicate that the Court was still following *Strecker.* Certainly Judge Lay must be presumed to be aware of the recent decision of the Eighth Circuit in *Robino* even though he did not participate. Nowhere does the Court of Appeals refer to either "ultimate" or "subsidiary" facts but it abides by the "clearly erroneous" standard except as to matters of law which they may freely review. *Spielberg Mfg. Co.* v. *Direct Sales Intern, Inc.,* 566 S.W. 2d 839 (Mo.App. 1978); *Murphy* v. *Carron,* 536 S.W. 2d 30 (Mo. en banc. 1976); Wright & Miller, Federal Practice and Procedure: Civil Sec. 2588.

II.

Whether The Plaintiff Possessed Standing To Sue Was A Matter Of Law And Could Therefore Be Freely Reviewed By The Appellate Court.

The Court of Appeals, referring only to the language of the underlying contracts for sale and to case law and treatises held that the Purchasers, Plaintiffs below and Respondents herein, were the real parties in interest by reason of valid assignments of

the sale contracts and therefore possessed standing to sue. Those persons entitled to maintain a suit is a matter of law. *State ex rel. Schneider* v. *Stewart,* 575 S.W. 2d 904 (Mo. App. 1978), *Mackey* v. *Randolph Macon Coal Co.,* 178 F. 881 (C.C.A. Mo. 1910). Therefore, from a reading of the plain language of the contract the Court of Appeals could determine as a matter of law that the contract allowed assignment to the named plaintiffs who were the real parties in interest. The appellate court is free to review the language of the contract as the interpretation of an unambiguous contract is a matter of law. *Harber* v. *Ohio Nat. Life Ins. Co.,* 512 F. 2d 170 (8th Cir. 1975); *Slotkin* v. *Willmering* 464 F. 2d 418 (8th Cir. 1972); *Commerce Trust Co.* v. *Howard,* 429 S.W. 2d 702 (Mo. 1968). The parties in this suit have not asserted that the language of the contract was ambiguous. Even had such an assertion been made, the question of whether an ambiguity exists is also one of law which the appellate court could fully consider. *Harris* v. *Union Electric Co.,* 622 S.W. 2d 239 (Mo. App. 1981); *Weltscheff* v. *Medical Center of Independence, Inc.,* 604 S.W. 2d 796 (Mo. App. 1980); *Busch & Latta Painting Corp.* v. *State Highway Commission,* 597 S.W. 2d 189 (Mo. App. 1980).

III.

Whether Sellers' Acts Amounted To A Waiver Of Purchasers' Initial Breach Was A Matter Of Law Properly Reviewed By The Court Of Appeals.

The District Court clearly found that the Purchasers' checks were received, cashed and held by DRG Financial Corporation up to and until December 5, 1979 (FOF #27 App. p. A-36). The District Court also found that Donald Ham (Seller) instructed his agent to continue working toward a closing of the contracts. (FOF #28 App. p. A-37). The District Court found that these facts amounted to a "partial waiver" by Sellers of Purchasers' breach. (FOF #28 App. p. A-37). The determina-

tion of the legal significance of Sellers' acts was in truth a conclusion on a matter of law. The Court of Appeals rightfully determined, *from these same facts* that the acts of the Sellers in accepting Purchasers' late payment and proceeding toward closing amounted to a *complete waiver,* as a matter of law. Whether certain facts amount to a waiver is a question for law and is properly reviewable by an appellate court. *S.S. Silverblatt, Inc.* v. *Seaboard Surety Co.,* 417 F. 2d 1043, 1055 (8th Cir. 1969). The Court of Appeals determined that a legal waiver had taken place without violating any facts found by the District Court and without substituting its own factual determinations.

IV.

The Court Of Appeals Was Not In Error In Determining That DRG Was Acting As Agent For Sellers In Obtaining An Extension Of The FHA Committments.

The District Court found that Sellers employed DRG as their agent on January 12, 1978 for *all* phases of application for FHA loan committments. (FOF #17 App. p. A-34).

The District Court made *no* additional findings regarding the agency relationship between Sellers and DRG. The only conclusion that can follow in the face of such findings by the District Court, who heard the evidence and could have made additional findings, is that DRG was still operating as Sellers' agent when it obtained the FHA extensions. For the District Court to find only that DRG was hired as an agent and imply that it was not an agent at a subsequent time is clearly erroneous and violates its own findings of fact. Where the facts are not in dispute the existence of an agency is a matter of law. *Baker* v. *St. Paul Fire & Marine Ins. Co.,* 427 S.W. 2d 281 (Mo. App. 1968). The Court of Appeals did not disturb the District Court's finding of an agency relationship.

In order to avoid making additional findings regarding the agency relationship, the District Court simply stated that the acts of DRG did not extend the closing date of the contract. (FOF #31 App. p. A-37). In making such a finding the District Court was interpreting the plain language of the contract and making conclusions of law and the Court of Appeals was free to substitute its own, more correct interpretation of the contract and law; i.e. that the acts of DRG did not extend the closing date of the contract. *S.S. Silverblatt, Inc.* v. *Seaboard Surety Co.*, 417 F. 2d 1043 (8th Cir. 1969).

V.

Petitioner Is Not Entitled By Virtue Of Rule 17 To Another Review Of The Facts Through The Guise Of Certiorari Review.

It is clear from the foregoing, a response to Petitioner's complaints, that Petitioner is merely seeking another review of the facts and evidentiary questions peculiar to this case alone. In reality, Petitioner is hoping that this court, through certiorari will again review the law applicable to the facts as found by the District Court.

The areas of the law considered by the lower courts; standing, waiver, agency, and interpretation of contracts, are not of such import as to warrant review by this court and none of these areas fall within the purview of Rule 17.

The Petitioner is obviously unhappy with the Court of Appeals' interpretation of the law. However, the Court of appeals herein has not rendered a decision in conflict with the decision of another federal court of appeals on the same matter. The Court of Appeals herein has not departed from the appropriate standard of review as stated in Rule 52. Nothing in the Court of Appeals decision warrants exercise of this court's power of supervision.

The Petition cannot be said to allege that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court, nor can it be said to allege that the court of appeals has decided a federal question contrary to applicable decisions of this court. See Rule 17.1(a)(c), Revised Rules of the Supreme Court of the United States.

CONCLUSION

The Petition asks this court to exercise its discretionary jurisdiction in order to consider a case that has been fully considered by the district court and the court of appeals. Petitioner seeks review of factual issues and evidentiary rulings peculiar to this case and conclusions regarding matters of law which, while important to the parties herein, are of no monumental significance to this court. Consideration by this court would amount to a review of the Court of Appeals application and interpretation of general principles of law and that is not the purpose for which a writ of certiorari was intended.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2413

Cedar Point Apartments, Ltd., a limited partnership by John G. Ariko, its general partner,

Appellant,

v.

Cedar Point Investment Corp., a Missouri corporation and William Bruce and Donald Ham; Donn H. Lipton; Robert B. Millard; McDonnell Douglas Corp.; Christina Ferer Millard; Patricia Ferer; Gershman Investment Corp.; Community Federal Savings & Loan,

Appellees.

Welling Green Apartments, Ltd., a limited partnership and Anthony J. Nicholson as general partner,

Appellant,

v.

B & D Investment Corporation; William Bruce; Donald Ham; Donn H. Lipton; Robert B. Millard; McDonnell Douglas Corp.; Christina Ferer Millard; Patricia Ferer; Missouri Savings Association,

Appellees.

Submitted: June 14, 1982

Filed: November 17, 1982

Appeal from the United States District Court
for the Eastern District of Missouri

Before LAY, Chief Judge, JOHN R. GIBSON, Circuit Judge, and FAIRCHILD,* Senior Circuit Judge.

LAY, Chief Judge.

This appeal involves a consolidation of two actions involving breach of contracts, tortious interference with contracts, and conspiracy to tortiously interfere with contracts for the sale of two apartment complexes. The district court, the Honorable James H. Meredith presiding, dismissed both cases on the grounds that the plaintiff-purchasers lacked standing to sue or, in the alternative, that plaintiffs initially breached the contracts and therefore could not recover damages for any breach by the defendant-sellers. 527 F. Supp. 602, 609-10 (E.D. Mo. 1981). We reverse; we hold that the plaintiffs have standing to sue, and that under the evidence presented they are entitled to recover for the sellers' breach of the contracts.

Facts.

Donald Ham and William Bruce, owners of the Wellington Green Apartments and the Cedar Point Apartments, employed BRG Financial Corporation in 1978 to act as their agent in all phases of application for F.H.A. Mortgage Insurance Commitments and to act as F.H.A.-approved mortgagee in processing F.H.A. insured loans on the two apartment complexes. DRG was additionally retained by Ham and Bruce as a broker and was given the exclusive right to sell both complexes. In the fall of 1978, Anthony Nicholson and John Ariko, through

* Thomas E. Fairchild, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

DRG, began preliminary negotiations with Ham and Bruce for the purchase of the properties. In January 1979 two contracts drafted by DRG were executed. Each contract required the purchasers to make a $20,000 earnest money deposit in the form of an irrevocable letter of credit in favor of the sellers no later than January 30, 1979.

On February 12, 1979, Nicholson sent two personal checks totalling $40,000 to DRG with instructions not to deposit until further authorization; Nicholson also advised DRG that he was arranging a bank letter certifying availability of funds for the checks. On March 8, 1979, the Florida National Bank sent DRG a letter stating that Nicholson had a line of credit with the bank to provide for the $40,000 advance and setting forth a method of payment in the event of insufficient funds for Nicholson's checks. On May 10, 1979, the sellers sent a mailgram to DRG which declared that the Florida bank letter did not meet the contractual requirements and instructed DRG to obtain compliance by May 16, 1979. DRG notified Nicholson that he must tender a $40,000 certified check or an irrevocable letter of credit by May 16. On May 15 Nicholson responded with a mailgram protesting the demand and claiming that the bank letter complied with the contract provisions; on May 17, however, he again mailed two personal checks totalling $40,000 to DRG.

Upon receipt of the checks DRG informed Ham of the payment; Ham instructed DRG to continue to work toward a closing under the two contracts. DRG cashed the checks and held the proceeds.

Each contract provided that a substantial portion of the purchase price was to be funded by secured notes insured by the F.H.A. The F.H.A. commitments to insure this primary funding were scheduled to expire ninety days after they were granted, or on June 14, 1979; closings on the sales of the apartments were contractually designated to occur contemporaneously with the closings on the F.H.A.-insured loans. On

June 8, 1979, with various preliminary contractual duties of both parties still incomplete, DRG requested a thirty-day extension from the F.H.A. on the commitments. The request was granted thereby extending the expiration of the commitments to July 16, 1979.

On June 8, 1979, Nicholson, who had been designated as the purchaser under the contracts, executed written assignments of all his rights in the two sales contracts to two limited partnerships. He was the general partner of one partnership, Wellington Green Apartments, Ltd.; John Ariko was the general partner of the other partnership, Cedar Point Apartments, Ltd. Ham, Bruce, Nicholson, and Ariko had previously agreed that the contracts would be assigned to two Florida limited partnerships to be formed by Nicholson and Ariko.

On June 12, 1979, Ham demanded fifteen days prior notice of the actual closing date, claiming that the contract required such notice; an attorney for the purchasers responded the next day with a letter specifying a June 29, 1979, closing date. On June 14, the sellers, who had not yet received the attorney's letter specifying a June 29 closing or DRG's notification of the thirty-day commitment extensions, appeared for closing at the F.H.A. offices. Later that same day, the sellers gave DRG written notice of immediate termination of both contracts on the ground that the purchasers had defaulted. The sellers demanded receipt of the $40,000 deposit as liquidated damages.

On June 18, 1979, the sellers discharged DRG as their agent. DRG asked Don Ham to suggest some way that the two apartment deals could be closed; in response, the sellers began immediate but unsuccessful renegotiations with the purchasers for the sale of the same properties at a higher price. Neither party appeared for the scheduled June 29 closing, and the F.H.A. commitments expired on July 16, 1979.

The two limited partnerships brought these actions on August 17, 1979, seeking specific performance of the contracts, damages equal to additional financing costs, actual damages for breach of contract, and actual and punitive damages for tortious interference with the contracts and conspiracy to interfere with the contracts. Each of the apartment complexes involved in the dispute was sold to third parties after the suits had been filed and the issue of specific performance was essentially abandoned at trial. The case was tried before the court for a week, and the district court judge ultimately dismissed both actions with prejudice. The partnerships now appeal contending that certain findings of the district court are clearly erroneous and that the trial court improperly concluded that they lack standing to sue.

Standing: The Restrictions on Assignment.

The contracts contain virtually identical provisions, including those relevant to the assignment issue. Each contract stipulates that it was entered into between the sellers and "ANTHONY J. NICHOLSON and/or ASSIGNS (hereinafter referred to as 'Purchaser')." Paragraph 21 of each contract provides: "The principals to this Agreement mutually agree that it shall be binding upon them, their and each of their respective heirs, executors, administrators, successors, and assigns." Paragraph 28 of each agreement is an assignment clause which states:

> Purchaser shall have the right to assign this Agreement to any partnership of which [sic][1] is a general partner; provided, however, that Purchaser shall have such right of assignment only if such assignee or transferee shall in writing expressly assume and agree to perform and discharge each and every obligation and liability of Purchaser set forth in this Agreement.

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[1] When the district court quoted this paragraph in its opinion, it apparently overlooked the contracts' omission of a word or words here, and inserted the word "it" where the omission appeared.

The district court held that the assignments of the contracts to the limited partnerships by Nicholson were void. The court found that the assignments were invalid on the grounds that paragraph 28 of each contract contained two express limitations on the power to make assignements which were not complied with: (1) Nicholson had not obtained a written assumption of duties from the assignee partnerships as mandated; and (2) Nicholson was merely a limited partner, not a general partner, of one of the partnerships. We respectfully must disagree. We hold that the assignments were valid. In construing paragraph 28 of the contracts, we hold as a matter of law that this paragraph serves only as a restriction on the delegation of duties, and not on the assignment of rights. Furthermore, even if it is argued that paragraph 28 was intended to affect the assignment of rights, the *power* to assign in violation of the restrictions is not affected by any stipulation in the contracts.

The provision in paragraph 28 of each contract that "Purchaser shall have the right to assign this Agreement" is an expressly permissive,[2] not prohibitive, form of assignment clause.

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[2] The clause indicates the intent of the sellers and the broker-mortgagee DRG to permit the delegation of the otherwise nondelegable duty of tendering promissory notes. Such a nondelegable duty is nevertheless delegable with or without an assignment of rights if the obligee-seller consents. *See* 4 A. Corbin, *Corbin on Contracts* § 865, at 445-46, § 870, at 475-76 (1951); J. Calamari and J. Perillo, *The Law of Contracts* §§ 18-25, -28 (2d ed. 1977); 3 S. Williston, *A Treatise on the Law of Contracts* §§ 411,411A (3d ed. 1960); Restatement (Second) of Contracts § 318(2) & comment c (1981).

The consent granted in paragraph 28 by the sellers and the mortgagee to the purchasers permitted delegation of the purchaser's duties to certain partnerships; however, in addition to delegation with the assignor remaining accountable, there must also be a promise by the assignees to perform. *See* 3 S. Williston, *supra*, § 418, at 101-03.

Paragraph 28 of the contracts is not the sole evidence of this advance consent to delegation of the purchaser's duties. The fact that "Nicholson and/or Assigns" are specifically designated as the "Pur-

Two restrictions, however, qualify this permission. As to the first restriction, each contract contains a typographical error: the purchaser's right to assign only extends "to any partnership of which [sic] is a general partner." Second, a concomitant duty is imposed if an assignment is made: the "Purchaser shall have such right of assignment only if such assignee or transferee shall in writing expressly assume and agree to perform" the purchaser's obligations under the contract.[3]

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chaser" in the contracts also discloses this permissive intent. *See* 4 A. Corbin, *supra*, § 871, at 478-79; Restatement (Second) of Contracts § 323 comment b (1981). Likewise, paragraph 21 of both contracts specifying that each agreement is binding on the principals and "each of their respective . . . assigns" is evidence of consent to the delegation of an otherwise nondelegable duty. 4 A. Corbin, *supra*, § 871, at 481; *cf. Little Rock Surgical Co.* v. *Bowers*, 227 Mo. App. 744, ____, 42 S.W.2d 367, 369 (1931); *In re Frayser's Estate*, 401 Ill. 364, ____, 82 N.E.2d 633, 638 (1948); *Baum* v. *Rock*, 106 Colo. 567, ____, 108 P.2d 230, 234 (1940) (conclusive evidence of intent). Additionally, the evidence presented during trial indisputably showed that during negotiation of the contracts, both parties anticipated that limited partnerships to be formed by Nicholson and Ariko would take over the contracts.

[3] The Restatement (Second) of Contracts § 328 (1981) provides that, unless the language or circumstances indicate the contrary, an "assignment of the contract" or of "all my rights under the contract" is not only an assignment of the assignor's rights but also a delegation of his unperformed duties under the contract; acceptance of such an assignment by an assignee is presumed to be a promise to perform the assignor's unperformed duties. *But cf. Hahn* v. *Earth City Corp.*, 625 S.W.2d 640, 643 (Mo. App. 1981) (unclear if Missouri accepts this presumption). An exception to this rule of construction exists, however, when a purchaser makes an assignment of a contract for the sale of land. Analogous to the situation where land is sold "subject to" a mortgage, no promise to assume the vendee's duties by the assignee is implied merely from the acceptance of the assignment without the presence of other circumstances indicative of such intent. *Hahn* v. *Earth City Corp.*, 625 S.W.2d 640, 643 (Mo. App. 1981); Restatement (Second) of Contracts § 328 comment c (1981); *see Senn* v. *Manchester Bank of St. Louis*, 583 S.W.2d 119, 127 (Mo. 1979) (en banc); *State ex rel. Hoyt* v. *Shain*, 338 Mo. 1208, ____, 93 S.W.2d 992, 997 (1936); *Futrall* v. *Triplett*, 84 F.2d 861, 863 (8th Cir. 1936).

Initially we must note the difficulties that have arisen when the phrase "assignment of the contract" has been employed. This ambiguous expression has been inartfully used to refer solely to an assignment of rights, solely to a delegation of duties, or to encompass both assignment of rights and delegation of duties. *See* J. Calamari and J. Perillo, *The Law of Contracts* § 18-1 (2d ed. 1977); 4 A. Corbin, *Corbin on Contracts* § 864, § 873, at 494 (1951); 3 S. Williston, *A Treatise on the Law of Contracts* § 407 (3d ed. 1961). However, unless intent to the contrary is shown, a contractual prohibition against "assignment of the contract" is presumed as a matter of law to refer only to delegation of contractual duties, not assignment of rights. *See Charles L. Bowman & Co.* v. *Erwin*, 468 F.2d 1293, 1297-98 (5th Cir. 1972); 4 A. Corbin, *supra*, § 872, at 484; 3 S. Williston, *supra*, § 422, at 138-39; Restatement (Second) of Contracts § 322(1) (1981). A contract provision expressly permitting assignment of the contract, as in paragraph 28, should likewise be so construed. Beyond the use of the phrase "right to assign this Agreement" in paragraph 28, no intent is shown that the restrictions contained in the paragraph apply to assignment of the purchaser's rights under the contracts. The clause does refer to "such assignee or transferee," but the addition of these words cannot be said to clarify the parties' intent.

These contract rights were freely assignable to the two limited partnerships. No material change in the sellers' duty to convey title to the realty or chance of receiving return performance occurred by these assignments of Nicholson's rights as purchaser under the contracts. *See* Restatement (Second) of Contracts § 317(2)(a) (1981). Such assignments were anticipated, and the

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Paragraph 28, with its provision that the assignee "shall in writing expresly assume and agree to perform" the purchaser's duties, clearly reveals the intent necessary to overcome this exception. Whether the phrase "right to assign this Agreement" in paragraph 28 was intended to refer to assignment, delegation, or both, *see* 4 A. Corbin, *supra*, § 864; 3 S. Williston, *supra*, § 407, a promise by the assignees to perform the purchaser's duties is mandated by the terms of each contract.

assignor Nicholson, whether or not a general partner of each assignee, would remain liable on the notes. *See Missouri Pacific Railroad Co.* v. *Rental Storage & Transit Co.*, 524 S.W.2d 898, 906 (Mo. App. 1975).

Alternatively, even if the phrase "right to assign this Agreement" in paragraph 28 is construed to apply to an assignment of rights, no intent is thereby shown to eliminate the *power* to assign the contracts in violation of the restrictions. The Restatement (Second) of Contracts § 322(2) (b) (1981) states the general rule that "[a] contract term prohibiting assignment of rights under the contract, unless a different intention is manifested, ... gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective . . . ." Most significantly for purposes of this appeal, neither the form nor terminology of paragraph 28 purports to clearly bar the power to assign or to invalidate an assignment not made in compliance with the restrictions. Merely the "right to assign," not the power to assign, is limited by the express language of the clause. No intent is thereby revealed to avoid an assignment not meeting the restrictions.[4] *See Detroit Greyhound Employees Federal Credit Union* v. *Aetna Life Insurance Co.*, 381 Mich. 683, ____, 167 N.W.2d 274, 277-78 (1969); 4 A. Corbin, *supra*, § 873, at 494.

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[4] One recognized commentator has pointed out that a contractual provision forbidding or restricting an assignment of rights under the contract may take any one of at least three distinct forms. J. Murray, Jr., *Murray on Contracts* § 306, at 623 (2d rev. ed. 1974); G. Grismore, *Effect of a Restriction on Assignment in a Contract*, 31 Mich. L. Rev. 299, 299-300 (1933). Only one of these forms reveals the intent necessary to preclude the power to assign or to cause an assignment violative of contractual conditions to be wholly void. Such a clause must contain express provisions to the effect that any *assignment* shall be void or that any assignment shall be invalid if not made in a certain specified way. *See Allhusen* v. *Caristo Constr. Corp.*, 303 N.Y. 446, ____, 103 N.E.2d 891, 892-93 (1952); 3 S. Williston, *supra*,

Other portions of the contract likewise do not reveal any intent to affect the validity of an assignment in violation of the contracts. To the contrary, other contractual provisions, such as the specification of the purchaser as "Nicholson and/or Assigns," and the clause binding the principals and their "assigns,"[1] as well as the circumstances surrounding the negotiation and execution of these contracts, strongly support the inference that paragraph 28, if it was intended to apply to an assignment of rights, was not intended to preclude the power to assign in violation of the restrictions.

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§ 422 n.6, at 130; J. Murray, Jr., *supra,* § 306, at 623; G. Grismore, *supra,* at 299-300; *cf. Silliman* v. *Chrisman,* 584 S.W.2d 441, 447 (Mo. App. 1979); *Portland Elec. and Plumbing Co.* v. *City of Vancouver,* 29 Wash. App. 292, ____, 627 P.2d 1350, 1351 & n.1 (1981).

If the contract provides that an assignment will make the *contract* void, the assignment is effective but the nonassigning party has the right to avoid the contract for breach of a condition precedent to his duty to perform. J. Murray, Jr., *supra,* § 306, at 623. On the other hand, the contract may contain only a promise by one or both parties to refrain from assigning or a promise to assign only under certain conditions. The promise creates a duty in the promisor but its breach does not render the assignment ineffective. *Hanigan* v. *Wheeler,* 19 Ariz. App. 49, ____, 504 P.2d 972, 975 (1972); *Murray First Thrift and Loan Co.* v. *Stevenson,* 534 P.2d 909, 911 (Utah 1975); J. Murray, Jr., *supra,* § 306, at 623; 3 S. Williston, *supra,* § 422, at 130-31 & n.6; G. Grismore, *supra,* at 300. If a breach of such a promise goes to the "root" or "essence" of the contract, the other party would have the option to avoid the contract on the basis of breach of a constructive condition. If such breach is not material, however, the other party merely would have an action for specific performance or for damages for breach of contract. G. Grismore, *supra,* at 300; *see* Restatement (Second) of Contracts §§ 225, 237, 241 (1981).

Although paragraph 28 is an affirmative grant of permission to delegate, these three conceptual distinctions are equally applicable and helpful in analyzing its effect since the permission it grants is subject to restrictions.

[1] See *supra* note 2.

We thus hold that these assignments are valid and that the assignee partnerships have standing to sue in this case as the real parties in interest. *See* Mo. Ann. Stat. § 507.010 (Vernon 1952).

Avoidance of the Contract.

Moreover, the sellers cannot successfully urge that they can avoid the contract on the ground that express conditions precedent to their duties were not fulfilled or that the assignments were a material breach of the contracts. The sellers initially dispute the assignments on the ground that there were no written promises from the assignees to comply with the stipulation that "Purchaser shall have such right of assignment only if such assignee or transferee shall in writing expressly assume and agree to perform" all the purchaser's duties under the contracts. Although there was no actual writing by the assignees,[6] we find that a valid and binding promise to assume the purchaser's duties can be implied from the conduct of the assignee partnerships. Even though an assumption of duties by the assignees is not presumed merely from acceptance of the assignment of these contracts,[7] the assignees may show intent to bind themselves by their actions, such as by suing for specific performance of the contracts as the assignee partnerships originally did here. *Epstein* v. *Gluckin*, 233 N.Y. 490, ____, 135 N.E. 861, 862 (1922) (Cardozo, J.); Restatement (Second) of Contracts § 328 comment c (1981); *see United Brick & Tile Co.* v.

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[6] It is readily apparent that the writing itself was not the operative goal under this restriction; rather, the writing was only a means to an end. *See* 3A A. Corbin, *supra*, § 650, at 114.

[7] See *supra* note 3.

McKissick, 51 F.2d 67, 69 (8th Cir.), *cert. denied*, 284 U.S. 677 (1931); *Kneberg* v. *H. L. Green Co.*, 89 F.2d 100, 103 (7th Cir. 1937).[8]

The sellers here obtained what they bargained for, although in a different form from that specified by contract. The object of the restriction requiring a written promise has been accomplished. *See Cheney* v. *Bilby*, 74 F. 52, 64-65 (8th Cir. 1896). The stipulation of a written promise is at most a condition of the purchaser's "right to assign." Such a condition may be excused without other reason if its requirement will involve extreme forfeiture or penalty, and its existence or occurrence does not form an essential part of the exchange for the promisor's performance. *Cessna Aircraft Co.* v. *Aviation, Inc.*, 243 F.2d 815, 819 (10th Cir. 1957). The absence of a written assumption of duties thus does not give these sellers the option to avoid the contracts for violation of an express condition precedent to their duty to convey.[9]

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[8] Other courts have held that assignees of a contract for the sale of land impliedly assume duties if they accept the assignment with notice of a provision within the contract that it is binding upon assigns. *See* 3 S. Williston, *supra*, § 418A n.16 (citing cases). In any event, when it is unclear whether an assumption as well as a delegation of duties has occurred, the mere presence in the original contract of a clause to the effect that assigns are bound is strong evidence of intent of assumption when there is an "assignment of the contract." 4 A. Corbin, *supra*, § 871, at 481; *cf. Kneberg* v. *H. L. Green Co.*, 89 F.2d 100, 103 (7th Cir. 1937) (the clause does not of itself impose an obligation on assignee, but gives him an option to be bound).

[9] The distinction between a mere promise or assurance that future performance will occur and a condition precedent to the duty of the other party is based upon intent. 3A A. Corbin, *supra*, § 633, at 32. The law does not favor conditions which cause forfeiture, *see Miran Inv. Co.* v. *Medical West Bldg. Corp.*, 414 S.W.2d 297, 304 (Mo. 1967); 3A A. Corbin, *supra*, § 635, and thus courts will not construe

Furthermore, construing this provision as a promise that a written assumption would be made if the contracts were assigned, we find substantial compliance existed. *See Gundaker* v. *Templer,* 560 S.W.2d 306, 309-10 (Mo. App. 1977). Nicholson did not make the written assignments to the partnerships until June 8, 1979; the partnerships did not file certificates of limited partnership with the state until June 13, 1979; the sellers declared the purchasers in default on June 14, 1979. The purchasers did not have a reasonable time before the contracts were terminated in which to deliver written promises to assume. Moreover, under the circumstances of this case, a written document evidencing an assignee's intent to assume was "merely an act to be performed in fulfillment of the ultimate contract objective, sale of the property and payment of the purchase price," and would have been a "routine element commonly attaching to the closing" of the sale of these properties. *Cohen* v. *Crumpacker,* 586 S.W.2d 370, 375 (Mo. App. 1979). Since the closings were never held, the assignee partnerships showed clear intent to assume the purchaser's duties within a reasonable time. *See* Restatement (Second) of Contracts § 204 (1981); 3A A. Corbin, *supra,* § 716. Thus substantial compliance with this restriction existed and there was no breach of a constructive condition of the contracts. *See Pasquel* v. *Owen,* 186 F.2d 263, 269-70 (8th Cir. 1950). The sellers are limited to merely seeking damages, if they can prove any, for breach of the restriction requiring a written assumption of duties.

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contract provisions to be conditions precedent to another party's duty under the contract unless "required to do so by plain, unambiguous language or by necessary implication." *Kansas City S. Ry. Co.* v. *St. Louis-San Francisco Ry. Co.,* 509 S.W.2d 457, 460 (Mo. 1974); *see* 5 S. Williston, *supra,* § 665. Words of condition, such as "upon condition that" or "provided" are not conclusive to distinguish between intent to create a condition precedent to another party's duty to perform and intent to merely covenant or promise. *Green County* v. *Quinlan,* 211 U.S. 582, 594 (1909); *Southern Surety Co.* v. *MacMillan Co.,* 58 F.2d 541, 547 (10th Cir.), *cert. denied,* 287 U.S. 617 (1932).

The sellers also contend one assignment is defective because Nicholson is a limited partner, not a general partner, of one of the assignee partnerships in violation of the restriction that "Purchaser shall have the right to assign this Agreement to any partnership of which [sic] is a general partner." We find that, under the circumstances present here, the sellers cannot use this stipulation to avoid their contractual duties on the basis of either an unfulfilled condition precedent or a breach of a constructive condition inferred from a promise.

In the Wellington Green Apartments' partnership, Nicholson is the general partner as well as one of the limited partners; John Ariko is the "initial limited partner" and one of the regular limited partners. In the Cedar Point Apartments' partnership, their roles are reversed so that Nicholson is not specified as a general partner.[10]

The trial court specifically found that Ariko as well as Nicholson had participated fully in the negotiations. 527 F. Supp. at 606. Both Nicholson and Ariko testified that before the execution of the contracts they discussed with the sellers the possibility that their roles as general partner and special limited partner might be reversed for financing purposes in one of the assignee partnerships to be formed. Both reported the sellers' response to be merely that they had done the same thing themselves on occasion. The testimony of Thomas Barken, associate of DRG and sellers' local sales agent, is also in accord on this point. Bill Bruce, one of the sellers, conceded in testimony that it probably would not make any difference to him as seller whether Ariko or Nicholson was a general partner.

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[10] Despite the different nomenclatures applied to Nicholson's status in the partnerships, Nicholson, as either general partner or "initial limited partner," shares in 4% of the general profits and losses and 33.33% of the profits from major capital events in both partnerships. Ariko, on the other hand, as either general partner or "initial limited partner," shares in only 1% of the general profits and losses and 16.67% of the profits from major capital events in both partnerships.

Additionally, in paragraph 16(b) of each contract, the seller warrants "[t]hat Seller understands that various divisions and subsidiaries of Purchaser, and officers, principals and stockholders thereof may be involved in this transaction as real estate brokers, mortgage brokers, general partners, limited partners, or agent or principal for the sale of mortgage-backed securities." Moreover, the F.H.A. commitments, applied for by DRG after the execution of the contract, list the proposed mortgagors on the projects as "Anthony J. Nicholson & John G. Ariko, General Partners, Partnership to be formed."

The evidence thus overwhelmingly supports the conclusion that John Ariko was intended by all the parties as a possible general partner of one assignee partnership. Although insertion of the word "it" into the deleted portion of paragraph 28 of both contracts would probably allow the paragraph to be read the way it was originally drafted, we find that such an interpretation clearly fails to express correctly the understanding reached by the parties as to the permissible structure of the limited partnerships. Whether we employ a process of interpretation, including the rule construing doubtful provisions against the drafting party, *Eastmount Construction Co.* v. *Transport Manufacturing & Equipment Co.*, 301 F.2d 34, 41 (8th Cir. 1962); 3 A. Corbin, *supra*, § 559, or employ the vehicle of contract reformation to correct a mistake in the written expression of the parties' agreement, *J.E. Hathman, Inc.* v. *Sigma Alpha Epsilon Club*, 491 S.W.2d 261, 268 (Mo. 1973) (en banc); *Edwards* v. *Zahner*, 395 S.W.2d 185, 189-90 (Mo. 1965); Restatement (Second) of Contracts §§ 155, 156 (1981), the sellers cannot avoid their duties under these contracts on the ground that Nicholson was not explicitly made a general partner of one assignee partnership when the evidence of the parties' true intent is so one-sided.[11]

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[11] This conclusion does not prejudice the sellers. Nicholson remains personally liable on the performance of the contract as the original purchaser and assignor. *Missouri Pac. R. R. Co.* v. *Rental Storage & Transit Co.*, 524 S.W.2d 898, 906 (Mo. App. 1975). With Ariko

The Contract Benefits.

In an alternative finding, the district court held that, even if the limited partnerships did have standing, they could not claim the benefits of the contracts because they failed to meet the June 14, 1979, closing date. 527 F. Supp. at 610. The court reasoned that the sellers only partially waived the purchasers' initial breach when they accepted the late down payment. It held that the sellers conditioned further contract performance on a closing date on or before June 14, 1979, the originally scheduled expiration date of the F.H.A. commitments.

Paragraph 14(a) of both contracts stipulates that the closings on the sale of the apartments are to occur contemporaneously with the closings on the F.H.A.-insured loans.[12] At the time

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designated as general partner of one partnership, the sellers in fact have increased their security; Ariko by such partnership formation subjects himself to personal liability beyond his ownership as a limited partner. *Compare* Mo. Ann. Stat. §§ 359.090, 358.150 (Vernon 1968) *with* Mo. Ann. Stat. § 359.070 (Vernon 1968). Additionally, because of Nicholson's control over the disputed partnership, the purchasers have a strong argument in their contention that Nicholson would be found by a court to be a general partner as a matter of law. *See Filesi* v. *United States*, 352 F.2d 339, 341 (4th Cir. 1965); Mo. Ann. Stat. § 359.070 (Vernon 1968); *see also Garbo* v. *Hilleary Franchise Systems, Inc.*, 479 S.W.2d 491, 497-98 (Mo. App. 1972).

[12] Paragraph 14(a) states:

> *Time.* Settlement (closing) hereunder shall take place contemporaneously with the closing of the insured mortgage loan contemplated by Paragraph 10 hereof, and if the closing of the sale contemplated by this Agreement shall not have occurred on or before the expiration of said commitment through a failure or refusal on the part of Purchaser to perform its obligations hereunder, then this Agreement shall be null and void and of no further force or effect and the deposit made pursuant to paragraph 4 hereof shall be paid to seller free and clear of any and all claims or rights of Purchaser.

Paragraph 27 of each contract provides: "*Closing.* The reference herein to closing means the closing held in which the first mortgage note is endorsed pursuant to the FHA conditional commitment attached hereto as Exhibit 'B'."

these contracts were executed, the parties did not have firm commitments form the F.H.A. to insure the first mortgages, and thus did not know the expiration date of such commitments. When the firm commitments were issued on March 16, 1979, they were scheduled to expire June 14, 1979, unless an extension of time was granted.[13]

After the sellers rejected Nicholson's letter of credit and demanded contract compliance by May 16, 1979, Nicholson protested the sellers' action by telegram and concluded: "It is my intent to close the contracts within the FHA commitment deadline of June 16 1979 . . . ." This telegram was sent two days before Nicholson mailed the personal checks for $40,000 to DRG on May 17. When these checks were accepted and the sellers authorized DRG to proceed to closing, neither DRG nor Nicholson were expressly informed by the sellers of any conditions attached to acceptance of the delayed deposit. On May 22, 1979, shortly after Nicholson had sent the checks which were cashed, Joseph Baron, attorney for the purchasers, sent a letter to DRG confirming the intent and ability of the purchasers to close the sale and stating: "Said closings will be accomplishd prior to the scheduled expiration of HUD's commitments to insure."

At the time of these declarations by Nicholson and Baron concerning the closing date, the scheduled expiration date on the loan commitments happened to be June 14, 1979. On June 8, 1979, however, an extension of the loan commitments was requested by DRG.

We do not find sufficient evidence to support the sellers' contention and the trial court's finding, *see* 527 F. Supp. at 607,

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[13] The F.H.A. commitments both stated: "This commitment shall expire 90 days from date of commitment, unless duly extended in writing by the Commissioner and upon such expiration all rights and obligations of the respective parties shall cease."

that sellers were "induced and persuaded to proceed with the deal" by representations from Nicholson and his attorney that closing would occur on or before June 14. As phrased, the statements by Nicholson and Baron concerning a closing date clearly do not reveal intent to offer new concessions to the sellers as compensation for the purchasers' breach of the deposit stipulations in the contracts. Both statements merely tracked the terminology employed in paragraph 14(a) of the contracts in reference to the then scheduled expiration date of the commitments. Such statements only show agreement to do that which the purchasers were already legally liable at that time to do. *See In re Windle,* 653 F.2d 328, 331 (8th Cir. 1981); *R-Way Furniture Co.* v. *Powers Interiors, Inc.,* 456 S.W.2d 632, 637 (Mo. App. 1970). There is not any evidence to show that both parties agreed that acceptance of the delayed checks would be conditioned on a closing date on or before June 14, rather than on or before the expiration date of the commitments. *See Nicholls* v. *Kammerich,* 626 S.W.2d 653, 656-57 (Mo. App. 1981); *Campbell* v. *Richards,* 352 Mo. 272, ____, 176 S.W.2d 504, 505 (1944). Moreover, there was not a writing to modify the express terms of these contracts for the sale of land. *See Three-O-Three Investments, Inc.* v. *Moffitt,* 622 S.W.2d 736, 740 (Mo. App. 1981); *Gee* v. *Nieberg,* 501 S.W.2d 542, 544 (Mo. App. 1973); *John T. Brown, Inc.* v. *Weber Implement & Automobile Co.,* 260 S.W.2d 751, 755 (Mo. 1953). We thus find that the sellers voluntarily and unconditionally waived Nicholson's default under the deposit provisions of the contracts when DRG accepted and retained the personal checks for $40,000 and the sellers instructed DRG to continue to proceed toward closing. *See Three-O-Three Investments, Inc.* v. *Moffitt,* 622 S.W.2d at 740-42; *Plymouth Securities Co.* v. *Johnson,* 335 S.W.2d 142, 152 (Mo. 1960); *Johnson* v. *Farrow,* 594 S.W.2d 655, 658 (Mo. App. 1980); *Domyan* v. *Dornin,* 356 S.W.2d 70, 72 (Mo. 1962); 3A A. Corbin, *supra,* §§ 723, 755.

We also find that the contract closing date was effectively extended beyond June 14, 1979, when DRG, as agent of the sellers, requested and was granted an extension of the expiration date of the F.H.A. firm commitments. The purposes of the contracts and the language of paragraph 14(a) concerning closing did not mandate that the contract closings occur on or before June 14, 1979, once that was no longer the expiration date on the commitments. The financing arrangements under which these apartments were to be sold made it imperative that closing occur on or before the expiration of the F.H.A. firm commitments to insure the loans. Because the F.H.A. program made the transaction possible, time was of the essence. Paragraph 14(a) of the contracts reveals the parties' clear intent that closings on the sales and the loans would take place contemporaneously either on or before the expiration date of the commitments. *See Cochran* v. *Grebe,* 578 S.W.2d 351, 353-54 (Mo. App. 1979); *Johnson* v. *Schuchardt,* 333 Mo. 781, ____, 63 S.W.2d 17, 19 (1933). Significantly, the very terms of the F.H.A. commitments, incorporated into both contracts, contemplated possible extensions of the originally scheduled expiration date. When DRG extended the expiration date on the commitments, the contract parameters concerning time for performance were also extended in accordance with the plain language and express stipulations in the agreements. *See Standard Title Insurance Co.* v. *Union Pacific Insurance Co.,* 364 F.2d 287, 289 (8th Cir. 1966); *O.A. Talbott & Co.* v. *Byler,* 217 S.W. 852, 853 (Mo. App. 1920).

Until June 18, 1979, when DRG was discharged by the sellers, it was expressly authorized to act as the sellers' agent in all phases of application for the F.H.A. mortgage insurance commitment and to also act as F.H.A.-approved mortgagee.[14]

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[14] This finding of the trial court, 527 F. Supp. at 606, is based on an agreement entered on January 12, 1978, by Bill Bruce on behalf of the sellers with DRG.

Although the sellers were unhappy with the extension of the expiration date, they are bound by this act of their agent. Whether or not the extension request was actually authorized by the sellers, an issue disputed by the parties, DRG was cloaked with broad apparent authority to bind the sellers on all matters pertaining to the F.H.A. applications, including the extension. *See* Restatement (Second) of Agency §§ 8, 145 (1958). The sellers in fact, in a letter to DRG, stated that they were terminating the relationship on the ground that DRG "had previously agreed to act as our agent" but "the principal thrust of . . . [DRG's] . . . efforts have been to serve the interest of the buyer under contract."

The fact that DRG may have been a dual agent does not change this result. DRG was authorized to act in its various capacities with the knowledge and consent of both parties. *See Macalco, Inc.* v. *Gulf Insurance Co.*, 550 S.W.2d 883, 895 (Mo. App. 1977); *Burton* v. *Pet, Inc.*, 509 S.W.2d 95, 100 (Mo. 1974). DRG was not guilty of any misconduct, nor can it reasonably be said that it acted adversely to the sellers' interests or tortiously when it extended the expiration date. *See Thomason* v. *Miller*, 555 S.W.2d 686, 688 (Mo. App. 1977); *Cossairt* v. *Reich*, 370 S.W.2d 291, 295 (Mo. 1963); *Fuchs* v. *Leahy*, 321 Mo. 47, ____, 9 S.W.2d 897, 900 (1928). Both the purchasers and sellers had contract duties uncompleted at the time of the extension request;[11] both could reap possible benefits from an extension of the expiration date. *See Dillard* v. *Rowland*, 520 S.W.2d 81, 91 (Mo. App. 1974).

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[11] In a June 14, 1979, letter, David Dempsey, an attorney for the purchasers, advised the sellers that closing could not occur at that time, because, among other reasons: (1) the sellers failed to authorize DRG to sell the GNMA Securities on the open market, thereby establishing the discount points the sellers were to pay, or in lieu thereof, the sellers failed to obtain agreements from their existing mortgagees to accept GNMA Securities; (2) the sellers failed to authorize the existing mortgagees to release to the purchasers or DRG

Because the deposit breach was totally waived by the sellers and because the closing date on the contracts was effectively extended by sellers' agent, the purchasers cannot be denied the benefits of these contracts on the ground that they were the first to violate its terms. We find that the sellers wrongfully repudiated these contracts on June 14 when they declared a default under paragraphs 14(a) and 14(b) of the contracts. The sellers' actions given the purchasers a claim for damages for total breach. Restatement (Second) of Contracts § 253(1) (1981).

The district court held, 527 F. Supp. at 610, that even if the contract date had been extended to July 16, 1979, the purchasers would still be precluded from recovery because they failed to appear for closing on June 29, 1979, the date for closing set by their own attorney, and failed to demand that the seller close prior to July 16 when the F.H.A. commitments would expire.

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the amounts necessary to pay off the existing deeds of trust; and (3) the sellers failed to complete certain interior repairs on the Wellington Green Apartments and as a result the HUD inspection of these apartments could not be completed.

On the other hand, the sellers asserted that the purchasers had not submitted necessary documents to the F.H.A. in time for closing to occur June 14. The sellers also claimed, and the district court agreed, 527 F. Supp. at 608, 610, that purchasers had a duty to give sellers fifteen days notice of the date of closing, and if such notice had been given, the repairs would have been completed by June 14. The contract language in paragraph 14(b) that this court finding is based on, however, states: "*Place.* Settlement or closing hereunder shall be conducted by a person or firm designated by Purchaser, such designation to be by notice in writing given Seller not less than fifteen (15) days prior to closing hereunder." This provision merely requires that the agent to act for purchasers at closing be designated at least fifteen days before closing. An agent of DRG, Clyde Frame, admitted it was his responsibility to give the notice under this provision to the sellers. In May 1979 the agent had written contract with Joseph Baron, purchasers' attorney, concerning the closing, and so presumptively had knowledge of the closing agent's identity. Moreover, in light of our holding that the contract closings were effectively extended past June 14, 1979, no notice was required before the end of May 1979.

We find, however, that the sellers' total repudiation relieved the purchasers of any further contract duties. A tender by one party is waived where the other party declares a repudiation of the contract or takes any position which would render tender a "vain and idle ceremony." *Miran Investment Co.* v. *Medical West Building Corp.*, 414 S.W.2d 297, 303-04 (Mo. 1967); *see M.K. Metals, Inc.* v. *Container Recovery Corp.*, 645 F.2d 583, 588 (8th Cir. 1981); Restatement (Second) of Contracts §§ 253(2), 255 (1981). Likewise, the effect of a repudiation is not changed if the other party to a contract urges the repudiator to retract his repudiation or to perform despite his repudiation. Restatement (Second) of Contracts § 257 (1981).

We thus reverse and remand this case for further findings in accord with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-1006-C (C)

John G. Ariko, as General Partner for Cedar Point Apartments, Ltd., a Limited Partnership,

Plaintiff,

v.

Cedar Point Investment Corporation, a Missouri Corporation,

and

Bill Bruce, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as General Partner in Bruce Properties Company, a Partnership,

and

Donald Ham, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as a General Partner in Bruce Properties Company, a Partnership,

and

Donn H. Lipton, individually; and as General Partner of Lipton-Millard II, Ltd.; and as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971; and as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973; and as Trustee of trust created for the benefit of Christina Ferer Millard under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973; and as Trustee of trust created for the benefit of Patricia Ferer under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973,

and

Robert B. Millard, individually; and as General Partner of Lipton Millard II, Ltd.,

and

McDonnell Douglas Corporation, a Maryland Corporation,

and

Christina Ferer Millard, as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971,

and

Patricia Ferer, as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973,

and

Gershman Investment Corporation, an Arkansas Corporation,

and

Community Federal Savings and Loan Association, a Corporation,

Defendants.

No. 79-1008-C (C)

Anthony J. Nicholson, as General Partner for Wellington Green Apartments, Ltd., A Limited Partnership,

Plaintiff,

v.

B & D Investment Corporation, a Missouri Corporation,

and

Bill Bruce, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as General partner in Bruce Properties Company, a Partnership,

and

Donald Ham, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as General Partner in Bruce Properties Company, a Parntership,

and

Donn H. Lipton, individually; and as General Partner of Lipton-Millard I, Ltd.; and as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971; and as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973; and as Trustee of trust created for the benefit of Christina Ferer Millard under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973; and as Trustee of trust created for the benefit of Patricia Ferer under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973,

and

Robert B. Millard, individually; and as General Partner of Lipton Millard I, Ltd.,

and

McDonnell Douglas Corporation, a Maryland Corporation,

and

Christina Ferer Millard, as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971,

and

Patricia Ferer, as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973,

and

Missouri Savings Association, a Corporation,

Defendants.

JUDGMENT

Findings of Fact and Conclusions of Law dated this date are hereby incorporated into and made a part of this judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be and is hereby entered in favor of each defendant and against the plaintiffs in Cause No. 79-1006-C (C) and Cause No. 79-1008C (C). These causes are dismissed with prejudice.

DATED this 30 day of October, 1981.

J. H. Meredith
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-1006-C (C)

John G. Ariko, as General Partner for Cedar Point Apartments, Ltd., a Limited Partnership,

Plaintiff,

v.

Cedar Point Investment Corporation, a Missouri Corporation,

and

Bill Bruce, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as General Partner in Bruce Properties Company, a Partnership,

and

Donald Ham, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as a General Partner in Bruce Properties Company, a Partnership,

and

Donn H. Lipton, individually; and as General Partner of Lipton-Millard II, Ltd.; and as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971; and as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973; and as Trustee of trust created for the benefit of Christina Ferer Millard under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973; and as Trustee of trust created for the benefit of Patricia Ferer under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973,

and

Robert B. Millard, individually; and as General Partner of Lipton Millard II, Ltd.,

and

McDonnell Douglas Corporation, a Maryland Corporation,

and

Christina Ferer Millard, as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971,

and

Patricia Ferer, as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973,

and

Gershman Investment Corporation, an Arkansas Corporation,

and

Community Federal Savings and Loan Association, a Corporation,

Defendants.

No. 79-1008-C (C)

Anthony J. Nicholson, as General Partner for Wellington Green Apartments, Ltd., A Limited Partnership,

Plaintiff,

v.

B & D Investment Corporation, a Missouri Corporation,

and

Bill Bruce, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as General partner in Bruce Properties Company, a Partnership,

and

Donald Ham, individually; and as General Partner in Wellington Green-Cedar Point, Ltd.; and as General Partner in Bruce Properties Company, a Parntership,

and

Donn H. Lipton, individually; and as General Partner of Lipton-Millard I, Ltd.; and as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971; and as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973; and as Trustee of trust created for the benefit of Christina Ferer Millard under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973; and as Trustee of trust created for the benefit of Patricia Ferer under terms of Indenture of Trust of Beverly Ferer Katz, Grantor, dated August 27, 1965, as amended November 24, 1973,

and

Robert B. Millard, individually; and as General Partner of Lipton Millard I, Ltd.,

and

McDonnell Douglas Corporation, a Maryland Corporation,

and

Christina Ferer Millard, as Trustee under Indenture of Trust of Christina Ann Ferer, Grantor, dated December 20, 1971,

and

Patricia Ferer, as Trustee under Indenture of Trust of Patricia Ferer, Grantor, dated June 13, 1973,

and

Missouri Savings Association, a Corporation,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is before the Court for a decision on the merits after trial to the Court. After consideration of the pleadings, testimony and exhibits introduced at trial, the parties' briefs and the applicable law, the Court makes the following findings of fact and conclusions of law. Any finding of fact equally applicable as a conclusion of law is adopted as such, and conversely, any conclusion of law equally applicable as a finding of fact is so adopted.

Findings of Fact

1. Cedar Point Apartments, Ltd., in Cause No. 79-1006-C (C) is a limited partnership organized and existing under the laws of the state of Florida. The Certificate of Limited Partnership was issued by the Florida Secretary of State on June 13, 1979. John G. Ariko, a citizen of the State of Florida, is its sole general partner and has brought suit herein in such capacity.

2. Wellington Green Apartments, Ltd., in Cause No. 79-1008-C (C), is a limited partnership organized and existing under the laws of the State of Florida. The Certificate of

Limited Partnership was issued by the Florida Secretary of State on June 13, 1979. Anthony J. Nicholson, a citizen of the State of Florida, is its sole general partner and has brought suit in such capacity.

3. Defendants Bill L. Bruce, Donald R. Ham, Donn H. Lipton and Patricia Ferer are citizens of the State of Missouri.

4. Defendants Robert M. Millard and Christina Ferer Millard are citizens of the State of New York.

5. Defendants B & D Investment Corporation and Cedar Point Investment Corporation are corporations duly organized and existing under the laws of the State of Missouri. Defendants Donald R. Ham and Bill L. Bruce are and have been since incorporation, the sole shareholders, directors and officers of each corporation.

6. Defendants Bill L. Bruce and Donald R. Ham are, and have been since formation, the sole partners of a partnership organized and existing under the laws of the State of Missouri, to-wit: Bruce Properties Company.

7. Wellington Green-Cedar Point is a limited partnership organized and existing under the laws of the State of Missouri. Its Certificate of Limited Partnership was executed on December 24, 1974 and was recorded with the Recorder of Deeds for St. Louis County, Missouri, on March 19, 1975. Its general partners from the date of organization to present are defendants Bill L. Bruce and Donald R. Ham. From December 24, 1974 to June 13, 1979, its limited partners were Harold B. Huhn and Nannett R. Huhn. On June 13, 1979, an Amended Certificate of Limited Partnership was executed, and from and subsequent to that date, the only limited partner of said partnership has been defendant Donald R. Ham. The amendment to the Certificate of Limited Partnership was filed with the Recorder of Deeds for St. Louis County, Missouri on June 14, 1979.

8. The Certificate of Limited Partnership of Wellington Green-Cedar Point at all times states that:

> "The character and purpose of the business of the limited partnership shall be to acquire, own, hold, manage, rent, lease, mortgage, encumber, and otherwise deal with certain parcels of real property, which parcels are hereinafter decribed, known as WELLINGTON GREEN APARTMENTS and CEDAR POINT APARTMENTS, and to do all other things necessary or incidental to such purposes."

9. Defendant McDonnell Douglas Corporation is and was a corporation duly organized and existing under the laws of the State of Maryland with its principal place of business in the State of Missouri.

10. In Cause No. 79-1008-C(C), defendant Missouri Savings Association was and is a corporation organized and existing by virtue of the laws of the United States with its principal place of business in the State of Missouri.

11. In Cause No. 79-1006-C (C), defendant Gershman Investment Corporation is and was a corporation duly organized and existing by virtue of the laws of the State of Arkansas with its principal place of business in the State of Missouri.

12. In Cause No. 79-1006-C (C), defendant Community Federal Savings and Loan Association was and is a corporation duly organized and existing by virtue of the laws of the United States with its principal place of business in the State of Missouri.

13. From January 11, 1979 to August 10, 1979, defendant B & D Investment Corporation in Cause No. 79-1008-C (C) held record title to the real property known as the Wellington Green Apartments, whose legal description is correctly set forth as follows:

A tract of land in the Southwest 1/4 of SECTION 6, TOWNSHIP 46 NORTH, RANGE 7 EAST, and described as follows: Beginning at the Northeast corner of property conveyed to St. Louis County, Missouri by deed recorded in Book 4525 Page 619; thence along the North line of said property, North 89 degrees 29 minutes West, 416.90 feet to the Northwest corner thereof in the East line of Property conveyed to Laura H. Schmitt and husband by deed recorded in Book 503 Page 163; thence along said East line, North 1 degree, 28 minutes East, 168.71 feet to the Northeast corner of said Schmitt property; thence along the North line of said property, North 89 degrees 29 minutes West, 104.3 feet to the Northwest corner thereof; thence North 1 degree 28 minutes East, 1831.40 feet to a Southwestern corner of property conveyed to Orville Behle by deed recorded in Book 3956 Page 464; thence along the Southern line of said Behle property, South 34 degrees 37 minutes East, 649.50 feet and South 64 degrees 22 minutes East, 110.5 feet to the Southeast corner thereof; thence South 0 degree 02 minutes East, 1421.78 to the point of beginning.

On August 10, 1979, by general warranty deed, Defendant B & D Investment Corporation purported to transfer all of its right, title and interest in said real property to the Wellington Green-Cedar Point, a Missouri limited partnership. Said warranty deed was recorded with the Recorder of Deeds for St. Louis County, Missouri on August 14, 1979.

14. From January 11, 1979 to August 10, 1979, defendant Cedar Point Investment Corporation held record title to the real property known as the Cedar Point Apartments, whose legal description is correctly set forth as follows:

A tract of land in U. S. Survey 110, Township 46 North, Range 7 East, and described as follows: Beginning at the intersection of the North line of Chambers Road and the

East line of Crown Point Drive, said East line also being the West line of U. S. Survey 110, thence along the East line of Crown Point Drive, North 8 degrees 17 minutes 04 secords East 1049.78 feet to a point in the center line of creek; thence along the center line of said creek the following courses and distances: South 15 degrees 54 minutes 45 seconds East, 22.23 feet, South 81 degrees 12 minutes East, 49.82 feet, North 82 degrees 47 minutes East 114.25 feet, North 24 degrees 38 minutes East 39.05 feet and South 78 degrees 13 minutes East 74.61 feet to a point in the West line of Pepper Lane Amended Subdivision as per plat book 73 page 36, thence along the West line of said Pepper Lane Amended Subdivision, South 1 degree 05 minutes East, 1045 feet to a point in the North line of Chambers Road, and thence along the North line of Chambers Road, the following courses and distances, North 89 degrees 57 minutes West, 407.01 feet to a point, North 0 degrees 03 minutes East, 5 feet, North 89 degrees 57 minutes West, 10 feet, South 0 degrees 03 minutes West, 5 feet and North 89 degrees 57 minutes West, 12 feet to a point of beginning according to survey by Volz Engineering and Surveying Co. during April 1971, now known as CEDAR POINT, as per plat thereof recorded in Plat Book 139 page 53 of the St. Louis County Records.

On August 10, 1979 by general warranty deed defendant Cedar Point Investment Corporation purported to transfer its right, title and interest in said real property to the Wellington Green-Cedar Point, a Missouri limited partnership. Said warranty deed was recorded with the Recorder of Deeds for St. Louis County, Missouri on August 14, 1979.

15. On August 20, 1979, the plaintiff in Cause No. 79-1006-C (C) filed with Recorder of Deeds for St. Louis County, Missouri, a Notice of Lis Pendens. The Notice of Lis Pendens was recorded with the Recorder of Deeds for St. Louis County, Missouri, and is recorded in Book A-8, page 315-316.

16. On August 20, 1980, the plaintiff in Cause No. 79-1008-C (C) filed with the Record of Deeds for St. Louis County, Missouri, a Notice of Lis Pendens. The Notice of Lis Pendens was recorded at Book A-8, page 313-314.

17. On January 12, 1978 Bill L. Bruce entered into an agreement on behalf of Bruce Properties Company with DRG Financial Corporation whereby DRG Financial Corporation would act as agent for Bruce Properties in all phases of application for F.H.A. Mortgage Insurance Commitment and whereby DRG Corporation would also act as F.H.A. approved mortgagee in processing F.H.A. insured loans on the Wellington Green Apartments and Cedar Point Apartments projects.

18. On April 7, 1978 Bill L. Bruce on behalf of Bruce Properties Company entered into two agreements with Thomas L. Barken Investment Company, Inc. and DRG Financial Corporation whereby DRG and Thomas L. Barken Investment Company, Inc. were given the exclusive right to sell, assign, and/or exchange Bruce Properties' interests in the Wellington Green Apartments and Cedar Point Apartments.

19. On January 11, 1979, defendants B & D Investment Corporation and Cedar Point Investment Corporation by their duly authorized officer, defendant Ronald R. Ham entered into contracts for the sale of the Wellington Green Apartments and the Cedar Point Apartments to Anthony J. Nicholson and/or assigns. Prior to January 22, 1979, Anthony J. Nicholson executed the same contracts.

20. Prior to the execution of the final contracts for sale of the Wellington Green and Cedar Point Apartments, there had been preliminary negotiation between the sellers (B & D Investment Corporation and Cedar Point Investment Corporation) by defendants Ham and Bruce and Anthony J. Nicholson and John G. Ariko. These preliminary negotiations commenced in October, 1978, and were conducted through DRG Financial Corporation. In the latter part of 1978, Ham, Bruce, Nicholson

and Ariko participated in direct negotiations which had been arranged by DRG Financial Corporation and Thomas L. Barken. At various times during the after contract negotiations, Ham, Bruce, Nicholson and Ariko discussed and agreed that the contracts for the two apartment complexes would be assigned to two Florida limited partnerships to be formed; and that DRG Financial Corporation could act as mortgagee for the purchasers. At that time Anthony J. Nicholson and John G. Ariko personally viewed the properties and were furnished and reviewed various financial documents and records relating to the properties.

21. Paragraph 4 of each contract for sale, specified that the purchaser was to deposit as an earnest money deposit with DRG Financial Corporation the sum of Twenty Thousand Dollars ($20,000.00) for each contract. The earnest money deposit was to be represented by an irrevocable letter of credit in favor of the seller. Further, said earnest money deposit was to be made no later than January 30, 1979.

22. On February 12, 1979, Anthony J. Nicholson tendered two (2) personal checks, No. 2133 and No. 2134, each in the amount of Twenty Thousand Dollars ($20,000.00) to DRG Financial Corporation. Nicholson accompanied his tender with instructions to hold the checks until he gave verbal authorization to cash them. Also on February 12, 1979, Nicholson stated to DRG that he would be offering the sellers a Florida bank letter certifying that the funds for the checks were available upon default. Said checks were never cashed or deposited by DRG Financial Corporation.

23. On March 8, 1979, the Florida National Bank at Orlando issued a letter addressed to Gunner Plake at DRG Financial Corporation whereby the bank stated Nicholson had a line of credit with the bank sufficient in amount to provide for a Forty Thousand Dollar ($40,000.00) advance. The bank agreed to forward Forty Thousand Dollars ($40,000.00) to DRG Financial

Corporation from the line of credit of Anthony J. Nicholson upon notice by DRG Fiancial Corporation to the bank of default by Nicholson under the terms of the sales contracts. In early March, 1979, a representative of Florida National Bank read the letter to Bruce over the telephone. A copy of this bank letter was subsequently delivered to sellers' offices by Thomas Barken, sellers' agent.

24. On May 10, 1979, defendants Cedar Point Investment Corporation and B & D Investment Corporation sent to DRG Financial Corporation a mailgram which stated that they considered the Florida National Bank letter unsatisfactory to meet the requirements of paragraph 4 under the sales contracts, and instructed DRG Financial Corporation to obtain contract compliance.

25. On May 11, 1979 DRG Financial Corporation sent by mail to Anthony J. Nicholson a copy of defendants' May 10th mailgram together with a letter requesting that Nicholson forward to DRG Financial Corporation either a certified check in the amount of Forty Thousand Dollars ($40,000.00) or an irrevocable letter of credit in favor of the sellers by 5:00 p.m. Eastern Daylight time on May 16, 1979.

26. On May 15, 1979, Anthony J. Nicholson sent to DRG Financial Corporation a mailgram in which he protested defendants' request for a Forty Thousand Dollar ($40,000.00) cash deposit on or before May 16 and stated that the Florida bank letter had been accepted by Bill Bruce as complying with the contracts of sale.

27. On May 17, 1979, Anthony J. Nicholson mailed two (2) personal checks, No. 372 and No. 2216, totalling Forty Thousand Dollars ($40,000.00) to DRG Financial Corporation for earnest money deposit on the purchase of the Wellington Green and Cedar Point Apartments. These checks were received by DRG Financial Corporation, subsequently cashed, and the funds were held by DRG Financial Corporation as earnest money deposit up to and until December 5, 1979.

28. Shortly after receiving Nicholson's checks of May 17, 1981, DRG Financial Corporation informed sellers of the receipt of the checks. Sellers' local sales agent, Thomas Barken, informed Donald R. Ham that the funds had been received. Ham then instructed Barken to continue to work toward a closing under the contracts for sale. Sellers also told DRG's Washington agent, Clyde Frame, to proceed to closing under the contract. Sellers were induced and persuaded to proceed with the deal and convey the property to the purchaser Nicholson based upon the representations by Nicholson that closing would occur on or prior to June 14, 1979, the date the commitments to insure were scheduled to expire.

29. A substantial portion of the purchase price provided in each contract was to be funded by notes secured by first deeds of trust. These notes were to be insured by the Federal Housing Administration, pursuant to the provisions of Section 223(f) of the National Housing Act. The balance of the purchase price was to be paid by cash at closing, the earnest money deposit and certain capital surplus notes. Commitments to insure the primary funding were obtained from the Federal Housing Administration and were issued on March 16, 1979. Said commitments, by their terms, expired ninety (90) days after issuance, which was June 14, 1979.

30. On June 8, 1979, DRG Financial Corporation requested the Federal Housing Administration to extend each of said commitments to insure for a period of thirty (30) days. On June 11, 1979 the Federal Housing Authority extended each commitment to insure until July 16, 1979.

31. The extensions to the Federal Housing Administration commitments to insure did not automatically extend the contracts or the time for closing.

32. DRG Financial Corporation, as mortgagee, was to finance the purchaser of the properties through the sale of "GNMA" securities. However, the only demand DRG Finan-

cial Corporation ever made on sellers to furnish commitments in writing from the present lenders or to authorize the sale of the securities on the open market was by letter dated June 13, 1979.

33. Paragraph 14(b) of each contract for sale provided:

> "Settlement or closing hereunder shall be conducted by a person or firm designated by purchaser, such designation to be by notice in writing given seller not less than fifteen (15) days prior to closing hereunder."

The only written notice that sellers received concerning closing was a letter dated June 13, 1979 from David Dempsey, one of purchaser's attorneys, setting closing for June 29, 1979 at the St. Louis HUD office.

34. In order to close the mortgage loans insured by the Federal Housing Administration, the purchaser had a duty to submit numerous documents to the Federal Housing Administration for their review and approval as part of any closing. Said documents included instruments creating the mortgagor entity, deeds of trust, security agreements, a mortgagor's certification as to actual costs, and a financing plan.

35. The purchaser or his representative did not submit all documents to the Federal Housing Administration in sufficient time for the closings to occur on or prior to June 14, 1979. Specifically, the mortgagor's certification as to actual costs and financing plans were not received by FHA until June 18, 1979. In addition, revised notes, deeds of trust, and other documents were not submitted to FHA for its approval until after June 22, 1979.

36. All required FHA repairs on the Cedar Point Apartments had been completed and approved by FHA by June 5, 1979. On June 12, 1979 FHA inspected the repairs on the Wellington Green Apartments and noted in an inspection report that certain interior and exterior items needed completion. The interior items needing completion were minor "punch-type" items. Had

the sellers been given notice on or before May 30, 1979 that closing was set for June 14, 1979, the remaining repairs could have been completed except for those exterior repairs for which FHA would have escrowed sufficient funds to cover the cost of completion.

37. The sellers appeared at the F.H.A. offices on the morning of June 14, 1979. At that time they learned that the HUD commitments to insure had been extended at the request of DRG Financial Corporation and that the purchaser had failed to submit all of the required documents to F.H.A. for review. Late in the afternoon on June 14, 1979, after leaving the F.H.A. offices, the sellers notified DRG Financial Corporation by letter that the contracts were terminated in light of the default by purchaser.

38. Neither the purchaser nor a representative of the purchaser appeared for closing on June 29, 1979 at the regional office of the United States Department of Housing and Urban Development in St. Louis as per the previous notification from the purchaser that closing would occur at that date and place. Neither the purchaser nor a representative of the purchaser ever made demand upon the sellers, orally or in writing, that the sellers honor the contracts and convey the property to the purchaser or his assign, either on June 29, 1979 or at some time prior to the expiration of the commitments to insure as they had been extended to July 16, 1979.

39. Had the purchaser or a representative of the purchaser appeared for closing at the time specified on June 29, 1979 and had the purchaser met all of the obligations under the contracts for sale, B & D Investment Corporation and Cedar Point Investment Corporation were prepared to close and convey title to the purchaser or his assigns on that date.

40. Paragraph 28 of each contract for sale provides:

> "Purchaser shall have the right to assign this agreement to any partnership of which it is a general partner; provided however, that purchaser shall have such right of assignment only if such assignee or transferee shall in writing expressly assume and agree to perform and discharge each and every obligation and liability of purchaser set forth in this agreement."

On June 8, 1979, Anthony J. Nicholson, as purchaser, executed assignments purporting to convey all of his right and interest in the contracts for sale as purchaser to the plaintiffs, the limited partnerships, respectively. At no time have plaintiffs in writing expressly agreed to assume and perform and discharge the obligations and liabilities of the purchaser. The evidence adduced simply showed that the limited partnerships, as purchasers, under the terms of the partnership agreement were authorized and empowered to assume the obligations and liabilities of the purchaser. Plaintiffs' evidence that they were prepared to agree in writing to assume the obligations and liabilities at closing does not comply with the terms and conditions of the contracts for sale.

Conclusions of Law

1. The Court has jurisdiction over these actions pursuant to 28 U.S.C. § 1332 in that there is total diversity of citizenship between plaintiffs and defendants and the amount in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars ($10,000.00).

2. Plaintiffs Cedar Point Apartments, Ltd. and Wellington Green Apartments, Ltd. lack standing to sue on the January 11, 1979 contracts because the assignments of the contracts to them by Anthony J. Nicholson are void. The January 11, 1979 contracts contain express limitations on the power to make assignments. Prohibitions or limitations in a bilateral contract on the right to assign are valid, binding, and enforceable. 6 Am. Jur. 2d, Assignments, § 22. Anthony J. Nicholson failed to

comply with the assignment clause in the contracts in that he never obtained written agreements from plaintiffs that they would perform each and every obligation of "purchaser" set forth in the contracts. Anthony J. Nicholson further failed to comply with the assignment clause in the contract for Cedar Point Apartments in that he is not a general partner in the Cedar Point Apartments, Ltd. partnership.

Plaintiffs have attempted to avoid these defects in the assignments by arguing that the assignment provisions in the contracts do not apply to them. Their argument is based on the language in the preamble to the contracts which defines "purchaser" as "Anthony J. Nicholson and/or assigns." Plaintiffs assert that they are actually "purchasers" within the meaning of this language and therefore that the assignment stipulations do not govern them. There is no basis for this argument. Reading the contracts as a whole, it is apparent that the assignment provisions were intended to apply equally to all assignees, including those taking directly from Mr. Nicholson as "purchaser."

Plaintiffs further argue that even if the assignment provisions do apply to them, those provisions have lost their effect. Their argument is premised on authority which holds that when assignees have rendered full performance on a contract or when such performance is presently offered, contractual stipulations regarding assignments are no longer binding and may not be invoked by defendants to avoid the contract. This rule was applied by the Eighth Circuit Court of Appeals in *Cheney* v. *Bilby*, 74 F. 52, 64 (8th Cir. 1896), *cert. denied* 164 U.S. 705, 17 S.Ct. 992 (1896). It appears to be based on the notion that the purpose of assignment restrictions is to safeguard performance on the part of the purchaser, so that once performance has been assured, the restrictions become of no further consequence. *See, e.g., Lambert Incorporated* v. *Starbrand Sales Corp.*, 422 F.2d 621, 625 (7th Cir. 1970).

The *Cheney* rule is not applicable to this case. Here, purchaser had repeatedly failed to comply with the terms of the contracts. Therefore, sellers lacked adequate assurance that full performance could be given and were entitled to compliance with the assignment stipulations. Such compliance being absent, the assignments must fail.

Finally, plaintiffs argue that the assignment provisions do not bar these actions because those provisions have been waived by defendants. This contention is without support. The record shows that defendants were aware that assignments were contemplated, but they at no time indicated that such assignments would be permitted without the written assurances provided for in the contract.

3. Assuming, *arguendo*, that plaintiffs have standing to bring these actions for the purported breach of contracts for sale, plaintiffs nevertheless cannot claim the contracts' benefits. The purchaser, Anthony J. Nicholson, breached the contracts by failing to deposit irrevocable letters of credit in favor of seller with DRG Financial Corporation on or prior to January 30, 1979. Although purchaser ultimately tendered checks as an earnest money deposit, those checks were personal, not certified. Although purchaser submitted a bank letter, that letter did not constitute an irrevocable letter of credit. Purchaser's personal checks and bank letter thus failed to comply with the specific language and terms of the contracts. Sellers bargained for clear guarantees of payment and were entitled to receive them. They did not.

Although sellers did accept purchaser's late tender of personal checks and the bank letter, that acceptance did not constitute a total waiver of purchaser's breach. Sellers specifically conditioned any further agreement to complete the sales and to convey the property to the purchaser or a valid assignee on the fact that closing occur on or prior to June 14, 1979, the then scheduled expiration date of the F.H.A. commitments to in-

sure. Purchaser again failed to comply. Purchaser did not give the notice required by the contract fifteen days in advance of June 14, 1979, nor did purchaser submit the necessary documents to the F.H.A. in sufficient time for the closing to occur on June 14, 1979.

Purchasers have claimed that by obtaining an extension of the F. H. A. firm commitments to insure until July 16, 1979, DRG Financial Corporation, as agent for sellers, extended the contract date and closing date to July 16, 1979. Such an interpretation is not compelled by the language of the contracts. Even if it were, plaintiffs would nonetheless still be precluded from recovery, because purchaser failed to appear for closing on June 29, 1979, the date set by its attorney, and failed to make demand upon sellers that they close prior to the time the F.H.A. commitments, as extended, expired on July 16, 1979.

The law is well settled that a party to a contract cannot claim its benefits where he is the first to violate its terms. *S. G. Adams Printing and Stationery Company* v. *Central Hardware Company,* 572 S.W.2d 625 (Mo.App. 1978), *Nabato* v. *Sletten,* 560 F.2d 340 (8th Cir. 1977). Because purchaser was the first to violate these contracts, judgment must be entered against the plaintiffs on their claims for damages under the contracts and for specific performance.

4. Likewise, judgment must be rendered against plaintiffs on their claims for tortious contractual interference and civil conspiracy. Where a party has breached a contract, the contract is void with regard to the other parties to it. Accordingly, no action for tortious interference or conspiracy will lie with respect to that contract. *See, e.g., McNamor* v. *Baltimore & Ohio Chicago Terminal R. Co.,* 254 F.2d 717 (7th 1958); RESTATEMENT (SECOND) OF TORTS, § 766, Comment P.

5. Because judgment is being rendered against plaintiffs on the above claims, it is unnecessary for this Court to address the validity of plaintiffs' lis pendens notices.

DATED this 30 day of October, 1981.

J. H. Meredith
UNITED STATES DISTRICT JUDGE

Office-Supreme Court, U.S.
FILED
MAR 23 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CEDAR POINT INVESTMENT CORPORATION, *et al.*,
Petitioners,

v.

CEDAR POINT APARTMENTS, LTD., a limited partnership
by John G. Ariko, its general partner,
Respondent.

and (CONSOLIDATED WITH)

B & D INVESTMENT CORPORATION, *et al.*,
Petitioners,

v.

WELLINGTON GREEN APARTMENTS, LTD., a limited partnership
and Anthony J. Nicholson, as general partner,
Respondent.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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III. The issues as to whether the acts of conduct of Petitioners (Sellers) constituted a partial or complete waiver of Respondents' breach is in the first instance a factual matter particularly as to their intent. The Court of Appeals erred in conducting its own independent review of the evidence and drawing and making different factual conclusions and inferences than did the District Court and thus hold that the critical factual finding by the District Court was "clearly erroneous" when in fact such finding by the District Court was supported by competent and express evidence on the record. The Court of Appeals further erred in determining the "ultimate" factual issue by also making and relying upon various "subsidiary" factual determinations..... 5

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SUPPLEMENTAL ARGUMENT AND REASONS FOR GRANTING THE WRIT

I

Contrary To Respondents' Argument, The Court Of Appeals Exceeded The Scope Of Rule 52(a), FRCP, In That The Court In Reaching Its Various Legal Conclusions Independently Made And Relied Upon Its Own View Of The Facts.

Nowhere in their Brief in Opposition have Respondents' challenged or disputed the Petitioners' statements as to the

factual record which had been developed in the District Court. Nor have Respondents disputed or challenged in any way Petitioners' assertions as set forth in their Petition for Certiorari as to how and in what way the Court of Appeals made its own Findings of Fact both on the "ultimate" and various "subsidiary" facts. In truth and in fact Respondents have no basis to so challenge. Rather, they simply contend, without any reference to the factual statements as set forth either in Petitioners' Statement of the Case or Argument that the Court of Appeals followed the "clearly erroneous" standard of Rule 52(a) except as to matters of law which they contend are freely reviewable.

But, Petitioners respectfully submit, as was demonstrated and set out both in their Statement of the Case and in the Argument portion of their Petition, that the record as developed in the District Court was replete with numerous contradictions in the testimony and thus subject to various and different inferences which could be drawn therefrom. Rule 52(a), FRCP, clearly mandates that such inferences are for the District Court to determine and resolve; not in the first instance for the Court of Appeals. See, *Pullman-Standard* v. *Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (April 27, 1982); and *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

Rule 17 of this Court clearly provides that one of the bases for the granting of certiorari is in cases where the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision." The granting of a Writ of Certiorari is not limited, as inferred by Respondents to those cases which involve or present a conflict with the decision of another Federal Court of Appeals on the same matter. Petitioners submit that unless certiorari is granted in the instant case that they will suffer substantial and irreparable monetary injury in the possible amount of 1.2 Million Dollars ($1,200,000.00) actual damages

as claimed by Respondents together with, if awarded, punitive damages. Furthermore, Petitioners also submit that the integrity of the judicial system particularly the proper role and scope of a Federal Court of Appeals vis a vis the role, scope, and power of a Federal District Court will be impaired unless this Court's power of supervision is exercised herein.

II

Although The Issue Of Whether Respondents (Plaintiffs) Had The Requisite Standing To Sue Is Primarily A Matter Of Law, Nevertheless Such Determination Must Be Made In Light Of The Facts As Made And Determined By The Federal District Court. A Court Of Appeals Is Barred, In Reviewing And Determining Matters Of Law, From Making And Conducting Its Own Independent Review And Then Making And Determining Factual Issues Not Resolved Or Decided By The District Court As Part Of Its Findings Of Fact. In Such Instances, If Factual Determinations Have Not Been Made, The Appropriate Procedure Is To Vacate And Remand To The District Court For Such Factual Determination.

Respondents in Point II of the Argument in Opposition contend that the issue of whether they, as the purported assignees of the Purchaser, had the requisite standing to maintain suit is purely a question of law which was to be determined from the plain language of the contracts and its provisions governing assignments. Thus, they contend that the Court of Appeals, in its Opinion, only referred to the plain language of the contracts for sale, to case law and to legal treatises. Not so. A reading of pertinent portions of the Opinion from the Eighth Circuit Court of Appeals refutes this statement. For example, on page A-10 the Court stated:

> "To the contrary, other contractual provisions, ..., *as well as the circumstances surrounding the negotiation and execution* of these contracts strongly *support the inference*

> that paragraph 28, *if it was intended* to apply to an assignment of rights, *was not intended to preclude* the power to assign in violation of the restrictions." (Emphasis supplied).

Then, continuing on page A-11 of its Opinion, the Court also stated:

> "Although there was no actual writing by the assignees, *we find* that a valid and binding promise to assume the purchaser's duty *can be implied from the conduct of the assignee partnerships.*" (Emphasis supplied).

By the very language of the Opinion, the Court of Appeals has demonstrated that it was making and drawing factual inferences and conclusions from the record, which were not made or determined by the District Court. Such procedure constitutes such a departure "from the accepted and usual course of judicial proceedings" so as to necessitate review under this Court's power of supervision. See, *Pullman-Standard, supra.;* and *Zenith Radio Corp., supra.*

III

The Issue As To Whether The Acts And Conduct Of Petitioners (Sellers) Constituted A Partial Or Complete Waiver Of Respondents' Breach Is In The First Instance A Factual Matter Particularly As To Their Intent. The Court Of Appeals Erred In Conducting Its Own Independent Review Of The Evidence And Drawing And Making Different Factual Conclusions And Inferences Than Did The District Court And Thus Hold That The Critical Factual Finding By The District Court Was "Clearly Erroneous" When In Fact Such Finding By The District Court Was Supported By Competent And Express Evidence On The Record. The Court Of Appeals Further Erred In Determining The "Ultimate" Factual Issue By Also Making And Relying Upon Various "Subsidiary" Factual Determinations.

One key clearly was not in dispute throughout the litigation. Nicholson, as Purchaser, had first breached each contract for sale by failing to comply with the earnest money deposit provisions. There is also no dispute that Respondents did not comply with the assignment provision of each contract. The crucial factual issue for resolution in this litigation was whether the Sellers *intended* to totally and completely waive the Purchaser's breach who was in a declared default when he made a late tender, but still not in the form as required by the contracts, of the earnest money deposit, and the Sellers instructed DRG to continue to work toward closing, but only after express representations were made by Purchaser as to when closing would occur.

Respondents in Point III of their Argument mislead and misconstrue the record by stating that the District Court had only found that Petitioner (Ham) had instructed his agent to continue working toward a closing of the contract, and then that the Court of Appeals only *from these same facts* (Emphasis Respondents) found that the same, as a matter of law, amounted to a complete waiver of the breach. (Brief pp. 5-6). But, this factual finding (FOF ¶28) by the District Court was only

part and parcel of the remainder of its total factual finding in this regard - to-wit:

> "Sellers were induced and persuaded to proceed with the deal and convey the property to the purchaser Nicholson based upon the representations by Nicholson that closing would occur on or prior to June 14, 1979, the date the commitments to insure were scheduled to expire." (FOF ¶28). (A-39)

The Court of Appeals in its Opinion simply disregards this finding and holds that it was "clearly erroneous" by stating that there was no evidence that the Sellers ever communicated either to the Purchaser or to DRG any conditions being attached to their waiver of the breach or to their authorization to proceed toward closing. But, as set forth on pages 23 through 25 of the Petition and as shown by the pages from the transcript of evidence as attached at Appendix E to the Petition for Certiorari (A 47-55) there was, in fact, an express communication and understanding between Petitioner Ham and DRG as to when closing had to occur - which was to be no later than June 14, 1979. This understanding was reached in light of the express representations by Purchaser and his attorney that closing will occur prior to the [then] scheduled expiration of the FHA commitments to insure. (See, A 53-54, Ex. X). Thus, there was competent and substantial evidence for the District Court's Finding, contrary to the decision of the Court of Appeals.

Secondly, Respondents have again not refuted or challenged in their Brief in Opposition those portions from the Opinion in which the Court actually made both the ultimate and subsidiary factual determinations based upon its own review of the record. Thus, contrary to the Statement in their Brief, the Court of Appeals in holding that there was a complete and total waiver of the breach by the Sellers did not simply rest on the "same facts" as had been decided by the District Court. If such was the case, why did the Court of Appeals hold that DRG, the mortgage

broker, was not guilty of misconduct and had not acted tortiously? Why did the Court of Appeals state that after the contracts had fallen through that it was the Sellers who had immediately commenced renegotiation for a higher contract price and which statement of fact was directly contradictory to Petitioners' evidence of record? Why did the Court of Appeals state and hold that the Petitioners at the time the extension of the FHA commitments to insure were obtained had uncompleted contract duties, and in making such statement made specific reference in Footnote 15 to a Respondents' Exhibit which was a letter from their attorney setting forth Respondents' view of the facts? Why did the Court of Appeals recite and state that on June 12, 1979 Petitioner Ham had demanded from Respondents' attorney, David Dempsey, fifteen (15) days actual prior notice of the closing date when such statement was directly and contradictory to the testimony of Petitioner Ham as to what he had demanded and what had occurred during this conversation? (See Petition for Writ of Certiorari pp. 11-17 and 27-28).

To argue the Court of Appeals simply relied upon the same facts and that the legal significance of Sellers' act "was in truth a conclusion on a matter of law" is simply not supported by the record. Missouri law which recognizes that a party can partially or conditionally waive a breach clearly holds that inherent in such a determination is a determination of the facts and a determination as to a party's intent. See, *Nicholls* v. *Kammerich,* 626 S.W.2d 653, 656-57 (Mo. App. 1981). Moreover, this Court has long recognized that issues as to intent are primarily factual matters. See, *Dayton Board of Education* v. *Brinkman,* 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979); and *Pullman, supra.*

Certiorari should be granted since the Court of Appeals by its Opinion "so far departed from the accepted and usual course of judicial proceedings" so as to necessitate review under this Court's power of supervision.

IV

The Court Of Appeals Erred In Determining In The First Instance That DRG Was Acting As Agent For Seller When It Obtained The Extension Of The FHA Commitments To Insure.

In Point IV of their Argument, Respondents correctly state that the District Court made no additional findings as to whether DRG when it obtained from FHA the extension of the commitments to insure was acting as the agent for the Sellers. But, Respondents misperceive the issue. Simply because the District Court did not make a finding on that issue does not then authorize the Court of Appeals to make its own factual determination in the first instance. Instead it has long been held by this Court that the appropriate procedure is to remand to the District Court with directions to make factual determination on issues not decided but necessary for determination. See, *DeMarco* v. *United States,* 415 U.S. 449, 94 S.Ct. 1185, 39 L.Ed.2d 501 (1074); and *InWood Laboratories* v. *Ives Laboratories,* 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982).

As demonstrated in the Petition, it would not have violated the District Court's previous Findings of Fact as to DRG initially being Sellers' agent to have found and concluded as a fact that when it requested and obtained the extension of the FHA commitments to insure that it did so as the agent for the Purchaser. The record and evidence clearly showed that when the contracts for the sale were executed that a shift in the parties relationship with DRG occurred. The Purchaser, pursuant to the terms of the contract for sale, had retained and employed DRG to be their agent for obtaining the mortgage funds and for processing in their name and on their behalf with FHA the firm commitments to insure.

CONCLUSION

Petitioners, contrary to Respondents' Argument, are not merely seeking another review of the facts and evidentiary questions peculiar to this case alone. Rather, Petitioners bring to this Court what they believe to be a case wherein the Court of Appeals, contrary to the recent teachings of this Court in *Pullman-Standard* v. *Swint, supra.*, and its subsequent progeny, has "so far departed from the accepted and usual course of judicial proceeding" so as to necessitate review under this Court's power of supervision. The proper administration of justice, the integrity of the judicial process, and the relationship as to the powers and scope of an Appellate Court vis a vis the power and scope of a Federal District Court are of such import as to warrant review. Petitioners are not simply complaining or unhappy with the Court of Appeals interpretation of the law. Rather, they submit that in this case the Court of Appeals under the guise of interpreting the law conducted its own independent review of the evidence, made its own factual inferences, viewed the record in the light most favorable to Respondents, and then made and substituted its version of both the "ultimate" and "subsidiary" facts than those from the District Court. Such constitutes a violation of Rule 52(a).

Certiorari should be granted.

Respectfully submitted,

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